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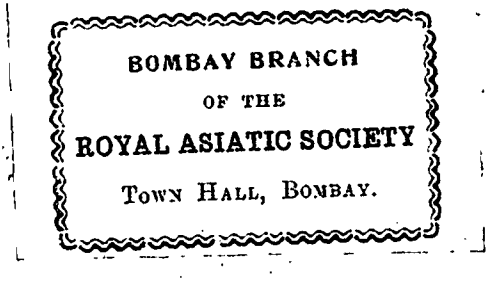

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ON

The Laws of England:

IN FOUR BOOKS;

WITH

AN ANALYSIS OF THE WORK.

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BY

SIR WILLIAM BLACKSTONE, KNT.

ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS.

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COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

CHAPTER I.

OF PROPERTY IN GENERAL.

Of the rights to property in general.

THE former book of these Commentaries having treated at large of the *jura personarum*, or such rights and duties as are annexed to the persons of men, the objects of our inquiry in this second book will be the *jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers on natural law style the rights of dominion, or property; concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider its several objects.

[2]

The nature and origin of such rights.

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give

themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him: or why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon
[3] the earth [a]." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

[a] Gen. i. 28.

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them, had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the antient method of living among the first Europeans themselves if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, wherein "*erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset*[b] [1]." Not that this communion of goods seems ever State of nature.

[b] Justin. l. 43, c. 1.

(1) "This state of nature of the philosophers is to be regarded as a mere fiction, not unlike that of the golden age which poets have invented; only with this difference, that the former is described as full of vice, violence, and injustice; whereas the latter is pointed out to us as the most charming and most peaceable condition that can possibly be imagined. The seasons, in the first age of nature, were so temperate, if we may believe the poets, that there was no necessity for men to provide themselves with clothes and houses as a security against the violence of heat and cold. The rivers flowed with wine and milk, the oaks yielded honey, and nature spontaneously produced her greatest delicacies. Nor were these the chief advantages of that happy age. The storms and tempests were not alone removed from nature, but those more furious tempests were unknown to human breasts which now cause such uproar and engender such confusion. Avarice, ambition, cruelty, selfishness, were never heard of; cordial affection, compassion, sympathy, were the only movements with which the human mind was yet acquainted. Even the distinction of *mine* and *thine* was banished from that happy race of mortals, and carried with it the very notion of property and obligation, justice and injustice.

"This no doubt is to be regarded as an idle fiction, but yet deserves our attention, because nothing can more evidently shew the origin of those virtues which are the subjects of our present inquiry. I have already observed that justice takes its rise from human conventions, and that these are intended as a remedy to some inconveniences which proceed from the concurrence of certain *qualities* of the human mind with the *situation* of external objects. The qualities of the mind are *selfishness* and *limited generosity;* and the situation of external objects is their *easy change*, joined to their *scarcity* in comparison of the wants and desires of men. But, however philosophers may have been bewildered in those speculations, poets have been guided more infallibly by a certain taste or common instinct, which in most kinds of reasoning goes further than any of that art and philosophy with which we have been yet acquainted. They easily perceived, if every man had a tender regard for another, or if nature supplied abundantly all our wants and desires, that the jealousy of interest which justice supposes, could no longer have place, nor would there be any occasion for

to have been applicable, even in the earliest ages, to ought but the *substance* of the thing; nor could it be extended to the *use* of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer[c]: or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he quitted the use or occupation of it, another might seize it, without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own[d].

Community of property.

[4]

Separate property.

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing

[c] Barbeyr. Puff. l. 4, c. 4.

[d] *Quemadmodum theatrum, cum commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occupârit.* De Fin. l. 3, c. 20.

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those distinctions and limits of property and possession which at present are in use among mankind. Increase to a sufficient degree the benevolence of men, or the bounty of nature, and you render justice useless, by supplying its place with much nobler virtues and more valuable blessings. The selfishness of men is animated by the few possessions we have in proportion to our wants, and 'tis to restrain this selfishness that men have been obliged to separate themselves from the community, and to distinguish between their own goods and those of others.

"Here, then, is a proposition which I think may be regarded as certain: *that 'tis only from the selfishness and confined generosity of men, along with the scanty provision nature has made for their wants, that justice derives her origin.*" (Hume, Philosophical Works, vol. 2, pp. 263, 266, ed. Edinburgh, 1826.)

to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession; if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom everything else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and homestall; which seem to have been originally mere temporary [5] huts or moveable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that moveables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labour of the occupant, which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

The article of food was a more immediate call, and therefore a more early consideration. Such as were not contented

with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of *water* also a very important point. And therefore the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security,
[6] "because he had digged that well [e]." And Isaac, about ninety years afterwards, reclaimed this his father's property; and, after much contention with the Philistines, was suffered to enjoy it in peace [f].

Right to land.

All this while the soil and pasture of the earth remained still in common as before, and open to every occupant: except perhaps in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which, Tacitus informs us, continued among the Germans till the decline of

[e] Gen. xxi. 30. [f] Gen. xxvi. 15, 18, &c.

the Roman Empire[g]. We have also a striking example of the same kind in the history of Abraham and his nephew Lot[h]. When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was, that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose: "Let there be no strife, I pray thee, between thee and me. Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left." This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not pre-occupied by other tribes. "And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered every where, even as the garden of the Lord. Then Lot chose him all the plain of Jordan and journeyed east; and Abraham dwelt in the land of Canaan."

[7]

Right of colonization.

Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practised as well by the Phœnicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind.

Labour and agriculture the principal source of property in land, &c.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed,

[g] *Colunt discreti et diversi; ut fons, ut campus, ut nemus placuit.* De Mor. Ger. 16.

[h] Gen. c. xiii.

without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connexion and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour? Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state
[8] of nature. Whereas now (so graciously has Providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its *rational* faculties as well as of exerting its *natural*. Necessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants: states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science [2].

(2) "As it is by establishing the rule for the stability of possession that the passion of self-interest restrains itself, if that rule be very abstruse and of difficult invention, society must be esteemed in a manner accidental and the effect of many ages. But if it be found that nothing can be more simple and obvious than that rule, that every parent, in order to preserve peace among his children, must establish it, and that these first rudiments of justice must every day be improved as the society enlarges: if all this appear evident, as it certainly must, we may conclude that 'tis utterly impossible for man to remain any considerable time in that savage condition which precedes society, but that his very first state and situation may justly be esteemed social. This however hinders not but that philosophers may, if they please, extend their reasoning to the supposed *state of nature;* provided they allow it to be a

Title originally occupancy.

The only question remaining is, how this property became actually vested; or what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to every body, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the *substance* of the earth itself; which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labour, is, from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savours too much of nice and scholastic refinement[3]. However,

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mere philosophical fiction which never had and never could have any reality. Human nature being composed of two principal parts, which are requisite in all its actions, the affections and understanding, 'tis certain that the blind motions of the former, without the direction of the latter, incapacitate men for society; and it may be allowed us to consider separately the effects that result from the separate operations of these two component parts of the mind." (Hume, Philos. Works, vol. 2, p. 263—Edinb. 1826).

(3) But it is of great importance that moral obligations and the rudiments of law should be referred to true and intelligible principles, such as the minds of serious and well-disposed men can rely upon with confidence and satisfaction.

Mr. Locke says, "that the labour of a man's body, and the work of his hands, we may say are properly his. Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property." (On Gov. c. 5).

But this argument seems to be a *petitio principii*; for, mixing labour with a thing can signify only to make an alteration in its shape or form; and if I had a right to the substance before any labour was bestowed upon it, that right still adheres to all that remains of the substance, whatever changes it may have undergone; if the right to it before belonged to another, it is clear that I have none after; and we have not advanced a single step by this demonstration.

The account of Grotius and Puffendorf, who maintain that the origin and

both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man

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inviolability of property are founded upon a tacit promise or compact, and therefore we cannot invade another's property without a violation of a promise or a breach of good faith, seems equally, or more, superfluous and inconclusive.

There appears to be just the same necessity to call in the aid of a promise to account for, or enforce, every other moral obligation, and to say that men are bound not to beat or murder each other, because they have promised not to do so. Men are bound to fulfil their contracts and engagements, because society could not otherwise exist; men are bound to refrain from another's property, because likewise society could not otherwise exist. Nothing therefore is gained by resolving one obligation into the other.

But how, or when, then does property commence? I conceive no better answer can be given, than by occupancy, or when anything is separated for private use from the common stores of nature. This is agreeable to the reason and sentiments of mankind, prior to all civil establishments. When an untutored Indian has set before him the fruit which he has plucked from the tree that protects him from the heat of the sun, and the shell of water raised from the fountain that springs at his feet; if he is driven by any daring intruder from this repast, so easy to be replaced, he instantly feels and resents the violation of that law of property, which nature herself has written upon the hearts of all mankind.

This universal principle we find well described in the Laws of Menu Son of Brahmá; "Sages, who know former times, pronounce cultivated land to be the property of him who cut away the wood, or who cleared and tilled it; and the antelope, of the first hunter, who mortally wounded it." (3 Sir Wm. Jones, 341).—[CHRISTIAN.]

To say that a man has acquired a right to a piece of land because he has occupied it, does not perhaps establish or illustrate his right any better than to say that he has the right because he has bestowed labour in acquiring it; yet if a choice is to be made between two such unsatisfactory accounts of the matter, it must be allowed that the advocates of occupancy have the best of the argument. For, where A. first takes possession of a spot by driving a few stakes round it, and B. then comes and digs every part of it and tills it, it is admitted that the property remains in A., although, did right depend on labour merely, B. having expended most labour, would have the best title; which plainly shews that priority of occupation, and not labour, is the criterion of ownership. But why such priority should confer the right of property, neither party thinks it necessary to explain, unless the saying that it is "a principle of natural equity" be an explanation.

Hume, after observing that when men had perceived the necessity that property should be stable, they were naturally led, in determining what particular things should belong to particular persons, to observe what relations existed between such things and such persons; and adopted in general the most obvious relation, namely, that of prior occupancy or appropriation, proceeds—

"Some philosophers account for the right of occupation by saying, that every one has a property in his own labour; and when he joins that labour to anything, it gives him the property of the whole; but, 1st, there are several kinds of occupation where we cannot be said to join our labour to the object we acquire, as where we possess a meadow by grazing our cattle upon it; 2ndly, this accounts for the matter by means of *accession*, which is taking a needless circuit; 3rdly, we cannot be said to

seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

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join our labour to anything but in a figurative sense. Properly speaking, we only make an alteration on it by our labour. This forms a relation betwixt us and the object, and thence arises the property according to the preceding principle." (Philos. Works, vol. 2, p. 278).

"After the convention concerning abstinence from the possessions of others is entered into, and every one has acquired a stability in his possessions, then immediately arise the ideas of justice and injustice, as also those of property, right, and obligation. The latter are altogether unintelligible without first understanding the former: our property is nothing but those goods whose constant possession is established by the laws of society, that is, by the laws of justice. Those, therefore, who make use of the words *property* or *right* or *obligation* before they have explained the origin of justice, or even make use of them in that explication, are guilty of a very gross fallacy, and can never reason upon any solid foundation. A man's property is something related to him: this relation is not natural but moral, and founded on justice. 'Tis very preposterous therefore to imagine that we can have any idea of property without fully comprehending the nature of justice, and shewing its origin in the artifices and contrivance of man. The origin of justice explains that of property. The same artifice gives rise to both." (Philos. Works, vol. 2, p. 260).

The reference by Grotius of the origin of property to "a tacit and implied consent of all mankind" is more satisfactory than the nicer speculations of subsequent writers, for (apart from any consideration of the divine commands, with regard to which there is no dispute or difficulty) the evident general utility of enforcing a respect for property by public opinion and by laws, affords both a sufficient explanation of the origin of the notion of property, and a sufficient apology for the institution. And, indeed, although ethical writers differ so widely in their accounts of the origin of the various rights and their correlative duties, which are recognised among civilized nations, they generally agree in recommending them to public approval and observance on the ground of general utility solely, or on the higher ground of religious duty—which is itself chiefly enforced by arguments of a utilitarian character.

The *à priori* reasonings and demonstrations on which these writers have wasted so much ingenuity, owe their origin to a mistaken conception of the nature of a "right," which they would have to be something as necessarily pre-existing, independently of the will of man or even of God*, as the truths of geometry, instead of being, what its etymology indicates it to be, anything *directed* or *ordered* by a will, possessed in a greater or less degree (as the word *will* implies) of the means of enforcing or inducing compliance with its demands. Understand a right or a duty to originate in a command, express or im-

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* It is true that most Christian moralists make the rule of right to be the will of God; but as they also, without intending to utter a truism, assert the benevolence and moral excellence of the Deity, it is evident that they recognise a standard of morality independent of the will of God.

Abandonment of property.

Property, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to

plied, and the perplexity which arises from the first contemplation of the great variety of rights, as to their objects and sanctions or obligatory force, is at an end. A legal duty, the correlative of a legal right, is something which is commanded by the laws, and its sanction or obligatory force consists solely in the power of the executive to enforce obedience, or to inflict a penalty for disobedience. When some writers add to this a moral or religious obligation, they cease to regard the duty in its legal aspect, and imply a moral or religious duty as an incident to every legal duty. A moral duty is, in practice, that course of conduct which is approved of by the general opinion of a community, and the observance of which is sanctioned by all those penalties which public opinion is able to inflict; in theory, it is that course of conduct which the propounders of any particular system of *deontology* recommend to the approbation of mankind. A religious duty is that which is supposed to be commanded by the deity or deities of any religious system, and is sanctioned by the penalties of the hell or purgatory of that system, and recommended by the rewards of its paradise.

There is still another duty insisted on by those who hold the theory of a moral sense, which they refer to the dictates of *conscience*—a sensation, sentiment, or passion, exalted by them to the dignity of a distinct and independent intelligence and agent. Those who do not recognise an innate moral sense refer the phenomena of conscience to that sensation of uneasiness which we always feel in reflecting upon anything we have done against our present judgment or wishes; a sensation which, in the cases supposed to fall under the dominion of conscience, they distinguish from other uneasy sensations by the presence of the fear of punishment, from the Deity, from the laws, or from public opinion—of regret that a favourite plan or desire, namely that of living virtuously, should have failed—of apprehension as to one's future frailty—of mortification of one's self-esteem on comparing one's self with others of a better conduct, and by the absence of any means of relief in anger against, or in seeking the punishment of, another person. Of these characteristics, the most striking is that wound to one's vanity, or *self-liking* (to borrow an appropriate phrase from the author of the Fable of the Bees), which is always the effect of contemplating one's own unworthiness.

In the course of his strictures on the passage in which Blackstone speaks of the *duty* of the supreme power to make laws, Bentham gives the following account of rights and duties in general:

"That may be said to be my *duty* to do (understand political duty) which you (or some other person or persons) have a *right* to make me do. I have, then, a duty towards you: you have a right as against me.

"What you have a right to have me made to do is that which I am liable according to law, upon a requisition made on your behalf, to be punished for not doing.

"I say *punished;* for without the notion of punishment (that is, of *pain* annexed to an act, and accruing on a certain account and from a certain *source*) no notion can we have of either *right* or *duty*.

"One may conceive three sorts of duties: *political, moral,* and *religious;* correspondent to the three sorts of *sanctions* by which they are enforced; or the same point of conduct may be a man's duty on these three several accounts. After speaking of the one of these, to put the change upon the reader, and without forewarning begin speaking

a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law,

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of another, or not let it be seen from one first which of them one is speaking of, cannot but be productive of confusion.

"Political duty is created by punishment, or at least by the will of persons who have punishment in their hands; persons stated and *certain*,—political superiors.

"Religious duty is also created by punishment: by punishment expected at the hands of a person *certain*,—the Supreme Being.

"Moral duty is created by a kind of motive, which, from the *uncertainty* of the *persons* to apply it, and of the *species* and *degree* in which it will be applied, has hardly yet got the name of punishment: by various mortifications resulting from the ill will of persons *uncertain* and variable,—the community in general; that is, such individuals of that community as he whose duty is in question shall happen to be connected with.

"When in any of these three senses a man asserts a point of conduct to be a duty, what he asserts is the existence actual or probable of an *external* event, viz. of a punishment issuing from one or other of these sources in consequence of a contravention of the duty: an event *extrinsic* to and distinct from as well the conduct of the party spoken of as the sentiment of him who speaks. If he persists in asserting it to be a duty, but without meaning it should be understood that it is on any one of these three accounts that he looks upon it as such—all he then asserts is his own internal *sentiment:* all he means then is, that he feels himself *pleased* or *displeased* at the thoughts of the point of conduct in question, but without being able to tell why. In this case, he should even say so, and not seek to give an undue influence to his own single suffrage by delivering it in terms that purport to declare the voice either of God, or of the law or of the people."

"Now which of all these senses of the word our author had in mind; in which of them all he meant to assert that it was the duty of supreme governors to make laws, I know not. *Political* duty is what they cannot be subject to; and to say that a duty, even of the *moral* or *religious* kind to this effect, is incumbent on them, seems rather a precipitate assertion.

"In truth what he meant was neither more nor less, I suppose, than that he should be glad to see them do what he is speaking of; to wit, *make* laws: that is, as he explains himself, spread abroad the knowledge of them.—Would he so? So indeed should I; and if asked why, what answer our author would give I know not; but I for my part have no difficulty. I answer,—because I am persuaded that it is for the benefit of the community that they (its governors) should do so. This would be enough to warrant me in my own opinion for saying that they *ought* to do it. For all this I should not at any rate say that it was their *duty* in a *political* sense. No more should I venture to say it was in a *moral* or *religious* sense, till I were satisfied whether they themselves *thought* the measures useful and feasible, and whether they were generally supposed to think so.

"Were I satisfied that they *themselves* thought so, God then, I might say, knows they do. God we are to suppose will punish them if they neglect pursuing it. It is then their *religious* duty. Were I satisfied that the *people* supposed they thought so, the people, I might say, in case of such neglect,—the people by various manifestations of its ill-will will also punish them. It is then their *moral* duty." (Fragment on Government, edit. 1776, p. 179, n.).

An able discussion of the subject of

till such time as he does some other act which shews an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So, if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary: and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who may claim it again of the finder. And, this we may remember, is the doctrine of the law of England with relation to treasure trove[14]."

Origin of conveyances, wills, and inheritances.

But this method of one man's abandoning his property, and another seizing the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance: which may be considered either as a continuance of [10] the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property; the proprietor declaring his in-

[1] See vol. 1, p. 285.

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this note will be found in Mr. Austin's lectures on jurisprudence, published under the title of "The Province of Jurisprudence defined."

(4) As to the abandonment of incorporeal rights, or easements, see *Moore* v. *Rawson*, 3 B. & Cr. 332; *Liggins* v. *Inge*, 7 Bingh. 693.

tention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property; and Titius, being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession: thus the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides [5].

The most universal and effectual way of abandoning property, is by the death of the occupant: when, both the actual possession and intention of keeping possession ceasing, the property, which is founded upon such possession and intention, ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him: which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the de- [11]

(5) The giving of the property to another being a mode of enjoyment, the right of giving seems to be implied in the right of property, rather than to depend on the artificial reasoning in the text. Or it is founded, like the right of property itself, on the general consent of society and the perception of its utility; as in particular communities it is restrained on considerations of utility by particular laws; in England, for instance, by the laws against perpetuities, charitable devises, &c.

ceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion [k]. And farther, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed.

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil*, right. It is true, that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relations are
[12] usually about him on his death-bed, and are the earliest witnesses of his decease. They became therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore also, in the earliest ages, on failure of children, a

[k] It is principally to prevent any vacancy of possession, that the civil law considers father and son as one person; so that upon the death of either, the inheritance does not so properly descend, as continue in the hands of the survivor. (Ff. 28, 2, 11).

man's servants born under his roof were allowed to be his heirs, being immediately on the spot when he died. For, we find the old patriarch Abraham expressly declaring, that "since God had given him no seed, his steward Eliezer, one born in his house, was his heir [1]."

While property continued only for life, testaments were useless and unknown: and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by *testament;* that is, by written or oral instructions properly *witnessed* and authenticated, according to the *pleasure* of the deceased; which we therefore emphatically style his *will.* This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his moveables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the Eighth; and then only for a certain portion: for it was not till after the Restoration that the power of devising real property became so universal as at present.

Law of property necessarily arbitrary.

Wills therefore and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid: neither does any thing vary more than the right of inheritance under different national establishments. In England particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. In personal estates the father may succeed to his children; in landed property he never can be their imme-

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[1] Gen. xv. 3.

diate heir, by any the remotest possibility[6]: in general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance: in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice: while others so scrupulously adhere to the supposed intention of the dead, that if a will of lands be attested by only *two* witnesses instead of *three*, which the law requires[7], they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles, as if, on the one hand, the son had by nature a right to succeed to his father's lands; or as if, on the other hand, the owner was by nature entitled to direct the succession of his property after his own decease. Whereas the law of nature suggests, that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. The positive law of society, which is with us the municipal law of England, directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint; and, in defect of such appointment, to go to some particular
[14] person who from the result of certain local constitutions, appears to be the heir at law. Hence it follows, that where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed: and, where the necessary requisites are omitted, the right of the heir is

(6) The law is now different. Even when the text was written it was not impossible for a father to be immediate heir to his child, though not as father. (See post, pp. 210, n., 240, n.).

(7) Two witnesses are now sufficient.

equally strong and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed[8].

But, after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; such also are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition: which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

Some things still in common, as light, air, water, &c.

Again: there are other things in which a permanent property *may* subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturb-

And other things which would be so unless appropriated, as wrecks, &c.

(8) A strange confusion is here made of something which is called the law of nature, of positive law, and of the rules of morality; and few of his readers will agree with the commentator in concluding that an heir would always be morally justified in taking an advantage of a slip in the execution of his ancestor's will. Suppose the heir to be wealthy, distantly related to his ancestor, and personally a stranger to him; while the disappointed devisee is an adopted child, without fortune, who has been treated and has behaved as if the tie had been one of nature. The heir breaks no promise, it is true, by ruining the orphan; but few would be disposed, after such an act, to rely on his honesty.

ances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissention by vesting the things themselves in the sovereign of the state: or else in his representatives appointed and authorized by him, being usually the lords of manors [9]. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.

(9) See this doctrine discussed in the note to p. 419, post. The legislature has now vested the property of game, in most instances, in the occupier of the land on which it is found. (Stat. 1 & 2 Will. 4, c. 32).

CHAPTER II.

OF REAL PROPERTY; AND, FIRST, OF CORPOREAL HEREDITAMENTS.

THE objects of dominion or property are *things*, as contradistinguished from *persons:* and things are by the law of England distributed into two kinds; things *real* and things *personal*. Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place, as lands and tenements: things personal are goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go[1].

Things divided into real and personal.

(1) But there may, by the law of England, be *estates* or interests of a personal nature, although in immoveable things. Such are estates for years in land, which have at common law all the incidents of personal property; see p. 385. Mr. Fearne, after noticing the distinction between *things* real and *things* personal, says, "Now the word *hereditaments* in our law is applicable to both these species of things, but in a different mode or degree of relation, for when applied to the first, viz. things real, it generally denotes the things themselves, which are the subject of property, without regard to the nature or extent of property therein. Thus things real, that is, lands in all the extent of the above definition of them, are distinguished by the denomination of *hereditaments real;* but the word *hereditaments*, when used in relation to personal things, does not impart or signify the things themselves, but is only applicable to them, in respect of some inheritable right of which they are in some mode or other the subject, and, in this sense, inheritable rights relative to personal things only, and distinct from any local connection, are called *hereditaments personal.*

"Of a nature in some measure intermediate between the two already noticed, there is a third application of the word *hereditaments*, when it is used to denote inheritable rights respecting lands, or something issuing therefrom, or exerciseable thereon, or at least having some local connexion or relation separate and distinct from the enjoyment of the lands themselves. Inheritable rights of this description are termed *hereditaments mixed*, from their local relation on the one hand, and the personal perception, enjoyment, or exercise of them on the other. Hence we obtain the division of hereditaments into *real*, *mixed*, and *personal.*"

"Besides the distribution of hereditaments into real, mixed, and personal, there is another general division of them into *corporeal* and *incorporeal*, material to be attended to in this place. Corporeal hereditaments are such as are of a substantial corporeal nature.

Subject of real property divided.

In treating of things real, let us consider, first, their several sorts or kinds; secondly, the tenures by which they may be holden; thirdly, the estates which may be had in them; and, fourthly, the title to them, and the manner of acquiring and losing it.

First, the several sorts.

Land.

Tenement.

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments [2]. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar acceptation is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies

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This denomination, therefore, is confined to those subjects of property which are comprised under the denomination of things *real*, as before mentioned. Incorporeal hereditaments are such as derive the denomination of hereditaments not from the things themselves which are the subjects of the enjoyment, but from the inheritable rights of which they are the subject; for rights are of an incorporeal nature, and exist merely in the power and exercise of enjoyment.

"Incorporeal hereditaments, therefore, comprise the two divisions of mixed and personal hereditaments already noticed; and under the same denomination I would in this place be understood to include such real hereditaments as consist of rights to the future enjoyment of lands, divided from the immediate present possession; for though I do not recollect that remainders or reversions are anywhere expressly ranked under the division of incorporeal hereditaments, yet, unless we deny them to be hereditaments, our division must be defective, if they are not comprised under the one or other branch of it—and to that of corporeal hereditaments I think they are not properly referable; for, though corporeal hereditaments are their subject, yet, whilst the rights remain distinct and undivided from the right of actual possession, I see nothing substantial in their nature, nor do I comprehend how they can be considered as invested with any degree of corporeality. On the contrary, they seem clearly to fall within that predicament which I take to be the criterion of an incorporeal inheritance—tangi non potest, nec videri."

"There are also other properties common to them with other estates, which are universally and expressly arranged in the class of incorporeal inheritances—as, for instance, they do not lie in livery, and when once created and subsisting as such cannot be transferred without deed." (Posthumous Works, p. 8).

(2) The terms, lands, tenements, and hereditaments, and other names describing real property, are fully described in Co. Litt. 4. a. to 6. b. It will be found material to attain an accurate knowledge of them. An advowson in gross will not pass by the word "lands" in a will, but it is comprehended under the term tenements. Hob. 304; Fort. 351; 3 Atk. 464; Ca. temp. Talb. 143; 11 Moore, 139; 4 Bingh. 297.—[CHITTY.]

every thing that may be *holden*, provided it be of a permanent[3] nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind[4]. Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like[a]: and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements[b]. But an *hereditament*, says Sir Edward Coke[c], is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal, or incorporeal, real, personal, or mixed. Thus, an heir-loom, or implement of furniture, which by custom descends to the heir together with an house, is neither land, nor tenement, but a mere moveable; yet, being inheritable, is comprised

[a] Co. Litt. 6.

[b] Ibid. 19, 20. [See Cro. El. 116; 1 Leon. 188; 1 Str. 625; Ld. Raym. 1384.]

[c] 1 Inst. 6. [See 10 M. & W. 742.]

(3) As to the term *permanent* being part of this definition, see 1 Prest. Est. 10, and H. Chitty on Descents, 11, 12. —[CHITTY.]

(4) Therefore, in an action of ejectment, which, with the exception of tithe and common appurtenant, is only sustainable for a *corporeal* hereditament, it is improper to describe the property sought to be recovered as a *tenement*, unless with reference to a previous more certain description. 1 East, 441; 8 East, 357. By the general description of a messuage, a church may be recovered. 1 Salk. 256. The term *close*, without stating a name or number of acres, is a sufficient description in ejectment. (11 Coke, 55). In common acceptation it means an inclosed field, but in law it rather signifies the separate interest of the party in a particular spot of land, whether inclosed or not. (7 East, 207; Doct. and Stud. 30). If a man make a feoffment of a house "*with the appurtenances*," nothing passes by the words *with the appurtenances*, but the garden, curtilage, and close adjoining to the house, and on which the house is built, and no other land, although usually occupied with the house; but by a devise of a messuage, without the words "*with the appurtenances*," the garden and curtilage will pass, and, where the intent is apparent, even other adjacent property. (See 2 Saund. 401, n. 2; 1 B. & Cr. 350; 12 Ad. & E. 442; and further as to the effect of the word "appurtenant," 15 East, 109; 3 Taunt. 24, 147; 1 B. & P. 53, 55; 2 T. R. 498, 502; 3 M. & S. 171; 1 Cr. & M. 439; 6 Nev. & M. 282). The term *farm*, though in common acceptation it imports a tract of land with a house, outbuildings, and cultivated land; yet in law, and especially in the description in an action of ejectment, it signifies the leasehold interest in the premises, and does not mean a farm in its common acceptation. (See post, p. 318).—[CHITTY.]

under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament [d] [5].

Hereditaments then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body: incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments.

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke [e], comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, houses, and other buildings; for they consist, saith he, of two things; *land*, which is the foundation, and *structure* thereupon: so that, if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating its capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse [6], or a rivulet: but I must bring my action for the land that lies at

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[d] 3 Rep. 2. [e] 1 Inst. 4.

(5) By a condition is here meant a qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or a particular act is done or omitted to be done, an estate shall commence, be enlarged, or defeated. As an instance of the condition here intended, suppose A. to have enfeoffed B. of an acre of ground, upon condition that, if his heir should pay the feoffee 20*s*., he and his heir should re-enter; this condition would be an hereditament descending on A.'s heir after A.'s death; and if such heir after A.'s death should pay the 20*s*. he would be entitled to re-enter, and would hold the land as if it had descended to him. (Co. Litt. 201, 214. b.)—[COLERIDGE.]

(6) See 2 Cr. & J. 156. "If a man grant *aquam suam*, the soil shall not pass, but the pischary [right of fishing] within the water passeth therewith." (Co. Litt. 4. b.)

the bottom, and must call it twenty acres of *land covered with water* [f].(7) For water is a moveable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum,* is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line between the surface of any land and the centre of the earth, belongs to the owner of the surface [8]; as is every day's experience in the mining countries [9]. So that

[f] Brownl. 142.

(7) See 3 B. & Ad. 304; 5 Id. 24; 2 Nev. & M. 764, adopting the following words of Sir J. Leach, (1 Sim. & St. 190): "The right to the use of water rests upon clear and settled principles. *Primâ facie* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, or throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back, above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years."

(8) "I recollect a case where I held, that firing a gun loaded with shot into a field, was a breaking of the close. Would trespass lie for passing through the air in a balloon over the land of another?" Per Lord Ellenborough, 1 Stark. 58. In the case of mines, custom has in many places made an exception to this rule. See Bainbridge on Mines, Ch. II. Of course any portion of the space between the centre of the earth and the sky may be severed from the rest, and be capable of a distinct ownership. Thus a man may have a several inheritance in the upper story of a house, or in a private box at a theatre. (2 Gale & D. 435).

(9) *Rowe* v. *Brenton,* 3 Man. & Ryl. 133, 229. But mines of gold and silver, and ores containing gold or silver, belong to the crown, as an appendage to its prerogative of coining.

the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular
[19] names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which nothing passes but a right of fishing [g]: but the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of [10]; but by the name of land, which is *nomen generalissimum*, every thing terrestrial will pass [h] [11].

[g] Co. Litt. 4.

[h] Ibid. 4, 5, 6.

(Plowd. 339). The exercise of this right is controlled by the statutes 1 Will. & M. st. 1, c. 20, s. 4, and 5 & 6 W. & M. c. 6, s. 2.

(10) By the name of a castle one or more manors may be conveyed; and, *e converso*, by the name of a manor a castle may pass. 1 Inst. 5; 2 Inst. 31.—[CHRISTIAN.] See 1 Plowd. 168.

A messuage may include a garden and curtilage, a dovehouse, a mill, or shops. (Plowd. 171; 5 T. R. 48). "When land is built upon, it is a messuage, and if the building afterwards fall to decay, yet it shall not have the name of land, although there be nothing in substance left but the land, but it shall be called a toft, which is a name superior to land and inferior to messuage; and this name it shall have in respect of the dignity which it once bore." (Plowd. 170). A croft is an inclosed piece of land near to a messuage.

(11) See 12 J. B. Moore, 296. "A gross name may contain divers things corporeal, as a manor, monastery, rectory, castle, honour, and the like, are things compound, and may contain altogether messuages, lands, meadows, woods, and such like; and a thing corporeal may be parcel of a gross name and of a thing compound; but one simple thing corporeal cannot be parcel of or appurtenant to another simple thing corporeal; as, land cannot be parcel of or appurtenant to meadow, nor meadow parcel of or appurtenant to pasture, nor pasture parcel of or appurtenant to wood; nor can land be parcel of or appurtenant to a messuage, nor to any other thing corporeal." (Plowd. 170).

Although the words mentioned in the text, standing unexplained and uncontrolled, have the general meanings there attributed to them, they are often interpreted in a more extended or a more contracted sense, where the context and the circumstances of the case clearly point out that they were intended to be used in such a sense. Thus, where a conveyance, called a fine, was levied (i. e. made) of "*twelve messuages*, twelve gardens, twenty acres of land, twenty acres of meadow, twenty acres of pasture, five acres of wood, and five acres of land covered with water, in a certain parish;" and the party who levied the fine was proved to be seised of two estates in that parish, one of which contained twelve messuages, and land, &c., sufficient to satisfy the description in the fine, while upon the other estate were seven other messuages; it was decided that the fine did not pass those

seven messuages. Chief Justice Abbott, in delivering judgment said, "The term land may, for the purpose of the present case be allowed to be capable, sometimes, and according to some senses of it, of passing land with houses upon it. Nobody will doubt that if the word "land" merely is used, without any qualification, it would be sufficient to pass meadow and pasture land, and land covered with water; but where we find that in this instrument twelve messuages are mentioned, and where we find also not merely that twenty acres of land are mentioned, but also twenty acres of *meadow*, twenty acres of *pasture*, five acres of wood, and five acres of land covered with water; it is impossible not to see that the term land was not intended to comprise meadow and pasture; *à multo fortiori*, we must say, that it was intended not to pass houses. That being in my opinion the true construction of the instrument, and that the fine is capable of passing twelve houses and no more, the parol evidence was necessarily admitted, to shew what were the twelve houses which were intended to pass. That was a question of fact to be decided by the jury upon the evidence." (8 Dowl. & Ryl. 549).

CHAPTER III.

OF INCORPOREAL HEREDITAMENTS.

Incorporeal hereditament defined.

AN incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal), or concerning, or annexed to, or exerciseable within, the same[a] [1]. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And, indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand

[a] Co. Litt. 19, 20.

(1) Not necessarily, as in the case of an annuity granted by one person to another and his heirs, and not charged on any property. (Co. Litt. 20, 144. b.; 2 Ves. sen. 179). It is true, that (where the annuity was not granted by the crown or other corporation (2 Ves. sen. 170)), after the death of the grantor, the annuity would cease, so far as he left no property or *assets* for the payment of it; and so indirectly it would be charged on property. Offices and dignities are also examples of incorporeal hereditaments which do not issue out of any thing corporate; but, though so called, they seem scarcely to partake of the nature of property. (See 1 J. B. Moore, 353).

to hand. So tithes, if we consider the produce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments: for they being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense: that casual share of the annual increase is not, till severed, capable of being shewn to the eye, nor of being delivered into bodily possession.

Incorporeal hereditaments are principally of ten sorts: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents. Are of ten sorts.

1. Advowson is the right of presentation to a church, or ecclesiastical benefice. Advowson, *advocatio*, signifies *in clientelam recipere*, the taking into protection: and therefore is synonymous with patronage, *patronatus*: and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common, (from whence, as was formerly mentioned [b], arose the division of parishes), the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church of which he was the founder, endower, maintainer, or, in one word, the patron [c]. 1. Advowsons. Origin of.

This instance of an advowson will completely illustrate the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages, but it is a right to give some other man a title to such bodily possession. The advowson is the object of neither the sight nor the touch; and yet it perpetually exists in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporal possession be had of it. If the patron takes corporal possession of the church, the church-yard, the glebe, or the like, he intrudes on another man's property; for to Incorporeal nature of. [22]

[b] Vol. 1, p. 109.

[c] This original of the *jus patronatus*, by building and endowing the church, appears also to have been allowed in the Roman empire. Nov. 26, t. 12, c. 2; Nov. 118, c. 23.

these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, by verbal grant, either oral[2] or written, which is a kind of invisible mental transfer: and being so vested it lies dormant and unnoticed, till occasion calls it forth, when it produces a visible corporeal fruit, by entitling some clerk, whom the patron shall please to nominate, to enter, and receive bodily possession of the lands and tenements of the church.

Are appendant,

Advowsons are either advowsons *appendant*, or advowsons *in gross*. Lords of manors being originally the only founders, and of course the only patrons of churches[d], the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson appendant[e]: and it will pass or be conveyed, together with the manor, as incident and appendant thereto, by a grant

or in gross.

of the manor only, without adding any other words[f]. But where the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson in gross, or at large, and never can be appendant any more; but is for the future annexed to the person of its owner, and not to his manor or lands[g 3].

[d] Co. Litt. 119. [e] Ibid. 121. [f] Ibid. 307. [g] Ibid. 120.

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(2) The late learned Vinerian professor, Mr. Wooddeson, has taken notice of this inaccuracy, and has observed, that "advowsons, merely as such (*i. e.* in gross) could never, in any age of the English law, pass by oral grant without deed." (2 Woodd. 64). Lord Coke says expressly, that "grant is properly of things incorporeal, which cannot pass without deed." (1 Inst. 9). But before the Statute of Frauds, 29 Car. 2, c. 3, any freehold interest in corporeal hereditaments might have passed by a verbal feoffment, accompanied with livery of seisin. (Litt. § 59). And by such a verbal grant of a manor, Mr. Wooddeson justly observes, before the statute, an advowson appendant to it might have been conveyed. (2 vol. 64). But he who has an advowson, or a right of patronage in fee, may by deed transfer every species of interest out of it, viz. in fee, in tail, for life, for years, or may grant one or more presentations. —[CHRISTIAN.]

(3) An advowson may, however, be disannexed from the manor for a term only, as where the separation is made by a person having only a particular estate (as for years, or for life) in the manor, or, being made by the owner of the fee-simple, it is made only for a term of years or for life. (See Burn, Eccles. Law, *Advowson*, s. 3; 6 Rep. 64 b; 3 Scott, 561). An advowson may be appendant to land merely, as well as to a manor, as where the lord of a manor conveys land, parcel of the manor, with the advowson, which will then be appendant to the land, and will pass with it by a subsequent conveyance,

Advowsons are also either *presentative, collative* or *donative*[h]. An advowson presentative is where the patron hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified; and this is the most usual advowson[4].

And are representative,

[h] Ibid.

although not named: except in the case of a grant by the Crown. (Harg. Co. Litt. 121. b. n.; 1 Y. & C. 559).

(4) All persons seised in fee, in tail, or for life, or possessed for a term of years, of a manor to which an advowson is appendant, or of an advowson in gross, may present to a church when it is vacant. Although this is a right which is saleable, and is considered of great value, as a provision for relations, a pledge of friendship, or, what is its true use and object, the reward of learning and virtue; yet the possession of it never can yield any lucrative benefit to the owner, as the law has provided that the exercise of this right must be perfectly gratuitous, and so it will not pass under a demise of "commodities, emoluments, and profits." (Hob. 303). The advowson itself is valuable and saleable, but not the presentation when the living is void. (1 Leon. 205). And therefore, if an advowson is mortgaged to secure a debt, as the mortgagee can make no profit by presenting to the church, or account for any value in respect of it, to sink or lessen the debt, he shall be bound in equity to present the mortgagor's nominee; although, if the mortgagee usurp the presentation, it shall be good, unless the mortgagor (being under no disability) take the proper steps to put it aside within six months, the period fixed by the stat. Westminster 2nd, 13 Ed. 1, c. 5. (3 Atk. 458, 559; Prec. Ch. 71; Comyn, 609; 2 P. Wms. 405; 2 Sel. & Lef. 218; 1 Meriv. 493). In a court of law, of course, the mortgagor's right to have his nominee presented is not recognised. (Dick. 662). So a trustee must present the clerk of the *cestui que trust*. (2 Atk. 483; 3 Ed. 458; 2 W. Bl. 1053; 1 Meriv. 493). And so an infant may nominate and present to a benefice, for his guardian takes nothing but that for which he can account. (Co. Litt. 17. b., 89. a.; 3 Barr. 1514; 1 W. Bl. 440; 2 Eq. Ab. 520; 1 Fonbl. Eq. 84, n.) So, also, an advowson, though it was always assets for the payment of specialty debts, (3 P. Wms. 401; 3 Atk. 464; 7 Ves. 447), and may now be sold under the decree of a court of equity at the suit of a judgment creditor, (stat. 1 & 2 Vict. c. 110, s. 13), cannot be extended or taken in execution for a debt. (2 Saund, 63 f). And though the assignees of a bankrupt may sell the advowson, yet, if the church be void at the time of the sale, the bankrupt himself must nominate the clerk. (Mirehouse, 156; 6 Geo. 4, c. 16, s. 77; 7 Scott, 667).

The grant of the presentation made after the church is actually vacant is void; (Cr. El. 174, 788); and so if an advowson is sold when the church is void, the grantee cannot have the benefit of the next presentation; and it has been doubted whether the whole grant is not void. (Cro. El. 811; 3 Burr. 1510; Amb. 268). But it is now settled that such a grant, even though simoniacal, is void only as to the next presentation. (2 Wils. 174; 1 W. Bl. 490; 2 Id. 1054; 5 Taunt. 724).

A Jew may present to a living (7 Bligh, 322), but not a papist, (12 Ann. st. 2, c. 14, s. 1; 11 Geo. 2, c. 17; 10 Geo. 4, c. 16, s. 16; 7 Scott, 652); and by the Municipal Corporations Act (5 & 6 Will. 4, c. 6, explained by the

or collative,

An advowson collative is where the bishop and patron are one and the same person: in which case the bishop cannot present to himself; but he does, by the one act of collation or conferring the benefice, the whole that is done in common cases by both presentation and institution. An advowson donative [5], is when the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction [i]. This is said to have been antiently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of Archbishop Becket, in the reign of Henry II.[k] And therefore, though Pope Alexander III.[l] in a letter to Becket, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shews what was then the common usage. Others contend that the claim of the bishops to institution is as old as the first planting of Christianity in this island, and in proof of it they allege a letter from the English nobility to the pope in the reign of Henry the Third, recorded by Matthew Paris [m], which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that where the benefice was to be conferred on a mere layman, he was first presented to the bishop in order to receive ordination, who was at liberty to examine and refuse him; but where the clerk was already in orders, the living was usually vested in him

[23]

or donative.

[i] Co. Litt. 344.
[k] Seld. Tith. c. 12, § 2.
[l] Decretal. l. 3, t. 7, c. 3.
[m] A. D. 1239.

1 & 2 Vict. c. 31), municipal corporations were disabled from exercising church patronage, and were directed to sell such advowsons, &c., as they possesssed. The popular character of the elections, and the admissibility of dissenters to corporate offices consequent on the repeal of the Test and Corporation Acts, were the inducements to this enactment. (See 2 Scott, N. R. 394).

(5) If the founder ordain that he and his heirs shall present, then the ordinary shall have nothing to do with it. (Year Book, 6 Hen. 7, c. 14). Free chapels donative are of this nature. (See Brook, Ab. *Presentment al Esglise*).

As to presentation by co-parceners, joint-tenants, and tenants in common, see Co. Litt. 186. b.; 2 Saund. 116 b; 1 Ves. sen. 340; 10 B. & Cr. 584; 7 Scott, 652; 7 Sim. 257).

by the sole donation of the patron; till about the middle of the twelfth century, when the pope and his bishops endeavoured to introduce a kind of feodal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture[6].

(6) The better opinion seems to be, that all advowsons were originally donative; the patron conferring the church, and all the temporalities annexed, by investiture, without the necessity of any institution by the bishop. The clerk was not presented to the bishop, but was at once invested with the temporalities by the patron; although, as is said in the text, the *spiritual* character of the clerk was not complete unless he then received, or had previously received, ordination (as to which, now, see 13 & 14 Car. 2, c. 4, s. 14, and 44 Geo. 3, c. 43). After the church became vacant, and until the patron chose to fill it, he took the profits of the benefice to his own use, and on his death they went to his heir; there being no direct means of compelling him to fill the vacancy, but only ecclesiastical censures. (See Yelv. 61; 2 Roll. Rep. 97; Mallory, *Quare Impedit*, 35). After a long struggle, the church succeeded, about the beginning of the fourteenth century, in establishing almost universally throughout England the course of filling parochial churches by presentation to the bishop; and the practice of investiture by the lay patron was consequently discontinued. (Selden, Hist. Tithes, c. 12, s. 5). At the same time the doctrine of lapse was introduced, which entitled the ordinary to collate a clerk to the benefice, if the patron neglected to present one within six months from the happening of the vacancy. But some donatives survived this innovation, and some were so created by the Crown, or so established by their founders; and to these the law of lapse did not apply, but the patron still enjoyed the profits during a vacancy, and might at any time take back the benefice by resignation from the incumbent. (See the learned judgment of Littledale, J., 9 D. & Ry. 810; 7 B. & Cr. 113; Co. Litt. 144. a.; 2 Eden, 360).

The right of presentation on the next avoidance is part of the advowson, and, while the church is full, devolves with the advowson on the heir, (or, if the advowson be limited for a term of years, on the executor); but the right to the next presentation may, before the vacancy actually occurs, be severed from the advowson, and then it is a chattel and goes to the executor. (Dyer, 135 a; 7 Bligh, 256).

As soon as a vacancy happens, the right of nomination (in case of a *presentative* advowson) becomes a distinct right in the nature of a chattel, separate from the advowson, in the same manner as rent due is distinct from the rent-charge in fee in respect of which it became due. (2 Nev. & Per. 503). The presentation is the mode of enjoyment, the profit or rent of the estate, and like the rent or profit belongs to the owner of the estate at the time it accrues, in the nature of a personal chattel, distinct and severed from the inheritance; it belongs to him, not as owner of the advowson, but as an individual. (7 Bligh, 277). Therefore a lessee of an advowson may present after his term has expired to a vacancy which happened during the term, (Fitzh. N. B., *Quare Impedit*, 33, A.; 2 Roll. Ab. 345); and if a person seised in fee of an advowson presentative die during a vacancy, his executor shall present. (Com. Dig., *Esglise*, (H. 2); 2 Wils. 150). But in the case of a *donative*, as the heir is not compellable at com-

Destruction of donative.

However this may be, if, as the law now stands, the true patron *once* waves this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the [24] advowson is now become for ever presentative, and shall never be donative any more [n] [7]. For these exceptions to general rules and common right are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will therefore reduce it to the standard of other ecclesiastical livings [8].

[n] Co. Litt. 344; Cro. Jac. 63; [Yelv. 61].

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mon law to present, or affected by *lapse*, and may take the profits during the vacancy, such a right in the executor would be adverse to his interest; and this appears to be the foundation of the rule that gives the presentation to the heir, instead of the executor, upon the death of the patron of a donative during a vacancy. (2 Wils. 150; 7 B. & Cr. 151).

A corporation sole cannot take a chattel by succession (except by custom, or in the case of the Crown); and therefore where an advowson presentative is vested in an ecclesiastical person, and he dies during a vacancy, his executor (or, in case of a bishop, the Queen, by her prerogative), and not the successor, shall present. (7 B. & Cr. 113; 7 Bligh, 241, 280; Co. Litt. 388. a.) Where the same person is patron and incumbent, and dies, his heir is to present, (3 Lev. 47; 3 Buls. 47); but such patron and incumbent may devise the presentation. (1 Lev. 205; 2 Roll. 214; 6 Cruise Dig. 21; Mirehouse, 70).

(7) But the rule seems only to apply to donatives by prescription; for where a donative had been created by letters patent, it was held not to have been destroyed by several presentations. (2 Salk. 541; 3 Id. 140; Holt, 259). If a donative receive augmentation from Queen Anne's bounty, under stat. 1 Geo. 1, st. 2, c. 10, it loses its distinctive qualities.

(8) It may here be observed, that when an incumbent is made a bishop, the right of presentation for that turn is in the king, and is called a prerogative presentation; the law concerning which was doubted in Car. II.'s time, but in the time of king William it was finally determined in favour of the Crown. (2 W. Bl. 770).—[CHITTY.] This prerogative does not extend to donatives, for the promotion causes no vacancy in them. (Show. P. C. 184; 2 Br. P. C. 514. See stat. 3 & 4 Will. 4, c. 27, s. 31). Mr. Justice Dolben said, that this prerogative had always been grumbled at—that it never came in question but some grudge or other was against it, it having been so common in great livings that the true patron in St. Andrew's, Holborn, had not presented above once in a hundred years, when he presented Dr. Stillingfleet. And he added, the church would suffer by it, because there was no one who had a great living but would present a blockhead, who was not likely to be made a bishop, in order to preserve his presentation. (1 Show. 461).

II. A second species of incorporeal hereditaments is that of tithes; which are defined to be the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: the first species being usually called *predial*, as of corn, grass, hops, and wood [o]: the second *mixed*, as of wool, milk, pigs, &c. [p], consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross: the third *personal*, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due [q] [9]. II. Tithes, predial, mixed, personal.

[o] 1 Roll. Abr. 635; 2 Inst. 649. [p] Ibid. [q] 1 Roll. Abr. 656.

(9) The distinction between predial and mixed tithe is, that *predial* tithes, so called from prædium, a farm, are those which arise immediately from the soil, either with or without the intervention of human industry. Those are *mixed* which arise mediately through the increase or other produce of animals, which receive their nutriment from the earth and its fruits. Therefore agistment is a predial tithe, though, as it is incapable of being set out in kind, it is not within the statute 2 & 3 Ed. 6, c. 13. (Per Macdonald, C. B., 3 Anstr. 763). *Personal* tithes are so termed because they arise entirely from the *personal* industry of man. (Mirehouse, 1 and 2). These personal tithes are not, at present, paid anywhere except for fish caught in the sea, (Bunb. 256; 3 T. R. 385), or, by special custom, for fish caught in rivers, (Cro. Car. 339), and for corn-mills, (Mirehouse, 93; 3 Atk. 18; 2 Ea. & You. 240; 2 Price, 295; 3 Ves. & B. 71; 5 Sim. 243). Tithe is not payable, of common right, of things *feræ naturæ*, as of deer in a park, or rabbits in a warren, or a decoy in hands of owner, but by special custom may be due. (Com. Dig. *Dismes*, H. 4, 16; Owen, 34; Gwill. 275; Cro. Car. 339; 8 Price, 39).

In addition to this triple distinction, all tithes have been otherwise divided into two classes, *great* or *small:* the former, in general, comprehending the tithes of corn, peas, and beans, hay and wood; the latter, all other predial, together with all personal and mixed tithes. The distinction is important, because vicars are frequently endowed only with *small* tithes. Tithes are great or small, according to the nature of the things which yield the tithe, without reference to the quantity. Thus, clover-grass made into hay is of the nature of all other grass made into hay, and consequently is a great tithe; but if left for seed, its nature becomes altered, and, like other seed, it becomes a small tithe. Neither the manner or place of cultivation, nor the time of gathering, as has been formerly supposed, makes any alteration in its denomination. The inquiry is to be confined to the question, whether the nature remains the same; for on that alone the rule depends. Discussions have arisen on these points; it has been argued that all garden-tithes are of a distinct and different description, that every renewal within the small compass of a garden, even wheat itself, when sown there, should yield a small tithe. If, however, a root were to be called a small tithe when planted in a

It is not to be expected from the nature of these general commentaries, that I should particularly specify what things are titheable, and what not [10], the time when, or the manner and proportion in which, tithes are usually due [11]. For this I must refer to such authors as have treated the matter in detail: and shall only observe, that, in general, tithes are to be paid for every thing that yields an annual increase [12], as corn, hay, fruit, cattle, poultry, and the like; but not for any thing that is of the substance of the earth, or is not of annual increase, as stone, lime, chalk, and the like; nor for creatures that are of a wild nature, or *feræ naturæ*, as deer, hawks, &c., whose increase, so as to profit the owner, is not annual, but casual [r]. It will rather be our business to consider, 1. The original of the right of tithes. 2. In whom that right at present subsists. 3. Who may be discharged, either totally or in part from paying them.

[25]

1. Their origin.

1. As to their original, I will not put the title of the clergy to tithes upon any divine right, though such a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the gospel is, undoubtedly, *jure divino;* whatever the particular mode of that maintenance may be. For, besides the positive precepts of the New Testament, natural reason will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest

[r] 2 Inst. 651.

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garden, and a great tithe when planted in a field, there would be great confusion and variation in the tithes of every parish every year. The nature of crops admits of a definite description; their quantity is always liable to dispute; therefore, the law, which aims at certainty, adopts the above-mentioned rule; and, in direct subservience to it, it seems now settled, although in contradiction to some respectable authorities, that all personal and mixed tithes, as well as hops, flax, potatoes, turnips, herbs, apples, and fruit, cole-seed, clover-seed, rape-seed, saffron, teasels, thyme, and tobacco, are small tithes, however large the quantity in which they may be cultivated. (Mireh. 2; Jac. 95; 1 B. & C. 766; 7 Cl. & Fin. 744; 4 M. & Sc. 735).—[CHITTY.]

(10) See Mirehouse, 40 to 123.

(11) See Mirehouse, 30 to 40.

(12) A periodical increase, rather, for tithes are due of underwood and coppice wood, although they do not yield an *annual* increase, (Turn. & R. 249; see 4 Myl. & Cr. 600); and of saffron, which is gathered once in three years. (Gibs. 669).

of mankind, have a right to be furnished with the necessaries, conveniences, and moderate enjoyments of life, at their expence, for whose benefit they forego the usual means of providing them. Accordingly, all municipal laws have provided a liberal and decent maintenance for their national priests or clergy: ours in particular have established this of tithes, probably in imitation of the Jewish law: and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land, than upon any divine right whatsoever, unacknowledged and unsupported by temporal sanctions.

Introduction into England.

We cannot precisely ascertain the time when tithes were first introduced into this country. Possibly they were contemporary with the planting of Christianity among the Saxons by Augustin the monk, about the end of the sixth century. But the first mention of them, which I have met with in any written English law, is in a constitutional decree, made in a synod held A. D. 786 [s], wherein the payment of tithes in general is strongly enjoined. This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia and Northumberland, the bishops, [26] dukes, senators, and people. Which was a very few years later than the time that Charlemagne established the payment of them in France [t] and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy [u].

The next authentic mention of them is in the *foedus Edwardi et Guthruni;* or the laws agreed upon between king Guthrun the Dane, and Alfred and his son Edward the elder, successive kings of England, about the year 900. This was a kind of treaty between those monarchs, which may be found at large in the Anglo-Saxon laws [w]: wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the Christian clergy under his dominion;

[s] Seld. c. 8, § 2.
[t] A. D. 778.
[u] Book I. ch. 11. Seld. c. 6, § 7. Sp. of Laws, b. 31, c. 12.
[w] Wilkins, pag. 51.

and accordingly, we find [x] the payment of tithes not only *enjoined* but a *penalty* added upon non-observance: which law is seconded by the laws of Athelstan [y], about the year 930. And this is as much as can certainly be traced out, with regard to their legal original.

2. To whom due.

2. We are next to consider the persons to whom they are due [13]. And upon their first introduction (as hath formerly been observed [z]), though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased [a]; which were called *arbitrary* consecrations of tithes: or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common [b]. But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister; first by common consent, or the appointments of lords of manors, and afterwards by the written law of the land [c].

[x] Cap. 6.
[y] Cap. 1.
[z] Book I. Introd. § 4.
[a] 2 Inst. 646; Hob. 296.
[b] Seld. c. 9, § 4.
[c] LL. Edgar, c. 1 & 2; Canut. c. 11.

(13) The *rector* is primâ facie entitled to all the tithes of the parish, small as well as great; and the *vicar*, in order to take any part of them from him, must either produce an endowment or give such evidence of usage as presupposes an endowment, since courts will not presume anything in favour of the vicar against the rector. (2 Buls. 27; 2 Ves. sen. 511; Yelv. 86; 3 Atk. 497; Mirehouse, 11). Where an endowment does not extend to the tithe in question, a subsequent more extensive endowment may be presumed from usage. (Hardr. 328; 2 Buls. 27; 1 Price, 13; 2 Id. 250, 284, 329; 9 Id. 231); and forty years' usage is sufficient to afford presumption of a subseqnent endowment, (4 Price, 198; 2 Id. 450); and perhaps thirty or twenty years would suffice. (Gwillim, 648; Bunb. 144; 9 Price, 231; 2 Barn. & Cress. 54; Mirehouse, 15, 17). In general, a *curate* has no claim to the tithes of a parish. (Mirehouse, 20).

Portions of tithes may be vested in a person who is neither rector nor vicar, by grant before the restraining statutes, or by special appropriation, when it was lawful for every one to distribute and pay as he chose, (Dig. 84 b); and which may be evidenced by long possession. (Degge, c. 2, 226; 1 Anst. 311; Gwill. 1513). It being however a claim against common right, the rector has a right to throw the onus probandi upon the portionist. The parson of one parish, or other person, may prescribe to have some of the tithes in another parish, (Bac. Ab. *Tithes*, H.); and in an action of debt for not setting out the tithe claimed, it will not be necessary for the plaintiff to set forth his title particularly as such portionist, though it must be accurately shewn in evidence over what precise land the portion was granted. (Cro. Jac. 437; Mireh. 25; 6 Price, 483).—[CHITTY]. Tithes of extra parochial lands belong to the Crown. (8 Price, 39).

However, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of King John [d]. Which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under Archbishop Dunstan and his successors; who endeavoured to wean the people from paying their dues to the secular or parochial clergy (a much more valuable set of men than themselves), and were then in hopes to have drawn, by sanctimonious pretences to extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses, which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected: since, for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by Pope Innocent the third [e] about the year 1200, in a decretal epistle sent to the Archbishop of Canterbury, and dated from the palace of Lateran: which has occasioned Sir Henry Hobart and others to mistake it for a decree of the Council of Lateran held A. D. 1179, which only prohibited what was called the infeodation of tithes, or their being granted to mere laymen [f]; whereas this letter of Pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same pope in other countries [g]. This epistle, says Sir Edward Coke [h], bound not the lay subjects of this realm; but, being reasonable and just, (and, he might have added, being correspondent to the antient law,) it was allowed of, and so became *lex terræ* [14]. [28]

[d] Seld. c. 11.
[e] Opera Innocent. III. tom. 2, pag. 452.
[f] Decretal. l. 3, t. 30, c. 19.
[g] Ibid. c. 26.
[h] 2 Inst. 641.

(14) See 7 B. & Cr. 152.

This put an effectual stop to all the arbitrary consecrations of tithes; except some footsteps which still continue in those portions of tithes, which the parson of one parish hath, though rarely, a right to claim in another [15]; for it is now universally held [i], that tithes are due, of common right, to the parson of the parish, unless there be a special exemption. This parson of the parish, we have formerly seen [k], may be either the actual incumbent, or else the appropriator of the benefice; appropriations being a method of endowing monasteries, which seems to have been devised by the regular clergy, by way of substitution to arbitrary consecrations of tithes [l] [16].

3. Who or what discharged from payment in kind.

3. We observed that tithes are due to the parson of common right, unless by special exemption; let us therefore see, thirdly, who may be exempted from the payment of tithes, and how lands, and their occupiers, may be exempted or discharged from the payment of tithes, either in part or totally, first, by a real composition; or, secondly, by custom or prescription [17].

[i] Regist. 46; Hob. 296.
[k] Book I. p. 385.
[l] In extraparochial places the king, by his royal prerogative, has a right to all the tithes. See Book I. pp. 113, 284.

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(15) As to portions of tithes, see ante, 26, note (13).

(16) A parsonage is *appropriate* when it belongs to a spiritual corporation or patron; *impropriate* when it is in lay hands. (Ante, vol. 1, p. 385; Plowd. 493). The impropriation of rectories, and of tithes in lay hands, was a consequence of the dissolution of monasteries. The statutes 27 Hen. 8, c. 28, and 31 Hen. 8, c. 13, which confirmed the royal grants, expressly include parsonages and tithes; and the stat. 32 Hen. 8, c. 7, s. 2, entitled lay tithe-owners to the ecclesiastical remedies, as the 7th section gave them actions in the temporal courts. Lay tithes have all the incidents of other temporal hereditaments, may be entailed, and such entails may be barred in the same manner as in other tenements. (Co. Lit. 6, 159. a.; 3 Price, 323; stat. 3 & 4 Will. 4, c. 74).

Tithes so impropriated do not merge by unity of possession of the land out of which they arise, and will not pass by a conveyance of the land with "all hereditaments and appurtenants thereunto belonging." (6 Bac. Ab. 756; 3 Bos. & P. 362). But the recent statutes for the commutation of tithes have provided for the merger of impropriated tithes. (Infra, p. 32, n.).

(17) Where the owner of lands naturally barren improves and makes them productive, they are by the statute 2 & 3 Edw. 6, c. 13, s. 5, exempted from tithes for seven years. (7 Bac. Ab. 742; 5 Mau. & S. 166; 6 Taunt. 297; 1 B. & Ad. 907).

1. By real compositions.

First, a real composition is when an agreement is made between the owner of the lands, and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes, by reason of some land or other real recompense given to the parson, in lieu and satisfaction thereof[m]. This was permitted by law, because it was supposed that the clergy would be no losers by such composition; since the consent of the ordinary, whose duty it is to take care of the church in general, and of the patron, whose interest it is to protect that particular church, were both made necessary to render the composition effectual: and hence have arisen all such compositions as exist at this day by force of the common law [18]. But, experience shewing that even this caution was ineffectual, and the possessions of the church being, by [29] this and other means, every day diminished, the disabling statute, 13 Eliz. c. 10, was made: which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives, or twenty-one years [19]. So that now, by virtue

[m] 2 Inst. 490; Regist. 38; 13 Rep. 40.

(18) As to *real* compositions in general, see Mirehouse, 157. In order to establish it in evidence, the deed itself, executed between the commencement of the reign of Richard the First and the 13 Eliz., must be produced, or such evidence from whence, independent of mere usage, it may be inferred that the deed once existed, for otherwise every bad modus might be turned into a good composition. (3 Bac. 217; 2 Anst. 372; Wightw. 324; 2 Bos. & P. 206; 1 Dan. 10; 1 Price, 253; 3 Id. 608; 4 Id. 143; 4 Madd. 140; 2 You. & J. 548; Gwil. 587). Without such evidence of a deed, a composition real cannot be proved by reputation, though corroborated by evidence of non-payment of tithes; and a deed creating a composition real, will not be presumed from payment for two hundred years of a sum of 20*l.* in lieu of tithes. (4 Mad. 140; 2 Bos. & P. 206; Mirehouse, 156-7, 159; but see 5 Ves. J. 187). Where a composition real is to be presumed, there must appear to be mutual loss or gain on the respective parts of the parson and occupier. (3 Bos. & P. 207); see n. (29), p. 32, infra.

(19) And a composition made since that act, though confirmed by a decree in the Court of Chancery, did not bind the successor. (2 Wooddes. 107; 2 Swanst. 310; 2 You. & C. 421). But by Lord Tenterden's act, (3 & 4 Will. 4, c. 100, s. 2), every composition for tithes is declared valid, which, before the passing of the act, had been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which had not since been set aside, abandoned, or departed from.

of this statute, no real composition made since the 13 Eliz. is good for any longer term than three lives, or twenty-one years, though made by consent of the patron and ordinary: which has indeed effectually demolished this kind of traffic; such compositions being now rarely heard of, unless by authority of parliament [20].

2. By prescription de modo decimandi.

Secondly, a discharge by custom or prescription, is where time out of mind such persons or such lands have been, either partially or totally, discharged from the payment of tithes. And this immemorial usage is binding upon all parties; as it is in its nature an evidence of universal consent and acquiescence, and with reason supposes a real composition to have been formerly made. This custom, or prescription, is either *de modo decimandi*, or *de non decimando*.

Of a modus.

A *modus decimandi*, commonly called by the simple name of a *modus* only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as twopence an acre for the tithe of land: sometimes it is a compensation in work and labour, as, that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him: sometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs; and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing.

[30] To make a good and sufficient *modus*, the following rules

(20) With regard to compositions entered into between the tithe owner and any parishioner for the latter to retain the tithes of his own estate, it has been decided that they are analogous to leases from year to year between landlord and tenant; and if they are paid, without or after the expiration of an agreement, for a specific time, they cannot be put an end to without six months' notice before the time of payment; and the parishioner may avail himself of the defect of notice at the same time that he controverts the right of the incumbent to receive tithes in kind; an objection not permitted to a tenant who denies the right of the landlord. (*Case of Kensington*, 2 Rayner, 992; 2 Bro. 161; 1 Bos. 458). —[CHRISTIAN.] (4 Mee. & W. 198).

must be observed. 1. It must be *certain* and *invariable*[n], for payment of different sums will prove it to be no *modus*, that is, no original real composition; because that must have been one and the same, from its first original to the present time. 2. The thing given in lieu of tithes must be beneficial to the *parson*, and not for the emolument of *third persons* only[o]: thus a *modus*, to repair the *church* in lieu of tithes, is not good, because that is an advantage to the parish only; but to repair the *chancel* is a good *modus*, for that is an advantage to the parson. 3. It must be something *different* from the thing compounded for[p]: one load of hay, in lieu of *all* tithe hay, is no good *modus*; for no parson would *bonâ fide* make a composition to receive less than his due in the same species of tithe: and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a *modus* for another[q]. Thus a *modus* of 1*d.* for every *milch* cow will discharge the tithe of *milch* kine, but not of *barren* cattle: for tithe is, of common right, due for both; and therefore a *modus* for one shall never be a discharge for the other. 5. The recompense must be in its nature as durable as the tithes discharged by it; that is, an inheritance certain[r]: and therefore a *modus* that every *inhabitant* of a house shall pay 4*d.* a-year, in lieu of the owner's tithes, is no good *modus*; for possibly the house may not be inhabited, and then the recompense will be lost. 6. The *modus* must not be too large, which is called a *rank modus*: as if the real value of the tithes be 60*l.* *per annum*, and a *modus* is suggested of 40*l.*, this *modus* will not be established; though one of 40*s.* might have been valid[s]. Indeed, properly speaking, the doctrine of *rankness* in a *modus*, is a mere rule of evidence, drawn from the improbability of the fact, and not a rule of law[t]. For, in these cases of prescriptive or customary *moduses*, it is supposed that an original real composition was antiently made; which being lost by length of time, the immemorial usage is admitted as evidence to

Rules respecting: must be certain,

beneficial to parson,

different from thing compounded for.

A modus for one species of tithe no discharge of others,

must be durable

and not rank.

[31]

[n] 1 Keb. 602.
[o] 1 Roll. Abr. 649.
[p] 1 Lev. 179.
[q] Cro. Eliz. 446; Salk. 657.
[r] 2 P. Wms. 462.
[s] 11 Mod. 60.
[t] *Pyke* v. *Dowling*, Hil. 19 Geo. 3, C. B. [2 W. Bl. 1257].

Time of legal memory commences with the reign of Rich. I., A. D. 1189.

shew that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago ascertained by the law to commence from the beginning of the reign of Richard the First [u] [21]; and any custom may be destroyed by evidence of its non-existence in any part of the long period from that time to the present; wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the *modus* set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the First, this *modus* is (in point of evidence) *felo de se*, and destroys itself. For, as it would be destroyed by any direct evidence to prove its non-existence at any time since that æra, so also it is destroyed by carrying in itself this internal evidence of a much later original [22].

[u] 2 Inst. 238, 239. This rule was adopted, when by the statute of Westm. 1, (3 Edw. 1, c. 39), the reign of Richard I. was made the time of limitation in a writ of right. But, since by the statute 32 Hen. 8, c. 2, this period (in a writ of right) hath been very rationally reduced to 60 years, it seems unaccountable, that the date of legal prescription or memory should still continue to be reckoned from an æra so very antiquated. See Litt. § 170. 34 Hen. 6, 37. 2 Roll. Abr. 269, pl. 16.

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(21) The limits of legal memory were formerly fluctuating. They were long made to depend upon the period for bringing a writ of right, which, till 23 Hen. 8, was not any certain period before the commencement of the suit, but dated from some historical event, fixed from time to time, as the beginning of the reign of Henry I., the return of King John out of Ireland, the journey of King Henry III. into Normandy, or the coronation of King Richard I. The last epoch being fixed by the statute of Westm. 2, c. 46, as the time after which seisin must be proved, to maintain a writ of right, it was from thence adopted as the commencement of legal memory. When the 32 Hen. 8 provided that there should be a progressive period of limitation for writs of right, legal memory ought, pursuing the existing analogy, to have been considered as intending a period of sixty years next before the dispute arose. But unfortunately the analogy to writs of right was dropped, and the reign of Richard was adhered to, and is considered the commencement of legal memory for all purposes at the present day. (1st. Real Prop. Rep. p. 51; 2 Roll. Ab., *Prescription*, 269, fol. 14.) As to the modern contrivances and enactments for the purpose of escaping from this inconvenient rule, vide infra, p. 263.

(22) (See 2 Russ. & M. 102; 4 You. & C. 283, 269). To constitute a good modus, it should be such as would have been a certain, fair, and reasonable equivalent or composition for the tithes in kind, before the year 1189, the commencement of the reign of Richard 1; and therefore no modus for hops, turkeys, or other things *eo nomine*, introduced into England since that time, can be good, (Bunb. 307); but (per Ellenborough, C. J.), there

A prescription *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them. Thus the king by his prerogative is discharged from all tithes [v]. So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesiæ* [w] [23]. But these *personal* privileges (not arising from or being annexed to the land) are personally confined to both the king and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally titheable [x]. And generally speaking, it is an established rule, that, in *lay* hands, *modus de non decimando non valet* [y] [24]. But spiritual [32] persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of tithes by various ways [z], as, 1. By real composition: 2. By the pope's bull of exemption [25]: 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession: 4. By prescription; having never been liable

3. By prescription de non decimando.

[v] Cro. Eliz. 511.

[w] Cro. Eliz. 479, 511; Sav. 3; Moor. 910.

[x] Cro. Eliz. 479.

[y] Ibid. 511; [Godb. 211; 2 Jac. & W. 527].

[z] Hob. 309; Cro. Jac. 308.

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may be a good modus to include turkeys, though the bird have been introduced into this country within time of legal memory, as, if there were a modus "for all domestic fowl." (12 East, 35).

The question of rankness, or rather modus or no modus, is a question of fact, which courts of equity will send to a jury, unless the grossness of the modus is so obvious as to preclude the necessity of it. (2 Bro. 163; 1 Bl. 420; 2 Id. 1257; 3 Gwill. 1058, 1192; Mirehouse, 180 to 186).—[CHRISTIAN.]

(23) This rule holds good only as between spiritual persons in the same parish, for, without prescription, a parson who has glebe land in another parish must pay tithes for it. (1 Roll. Ab. 653; Selden, p. 76; 4 Price, 65).

(24) For *modus* read *præscriptio*. (See 4 You. & C. 285). And this maxim, that a layman shall not prescribe to be discharged of tithes, is so inflexible, that the judges have felt themselves bound to violate in its favour the ordinary rules of presumption, and to hold that no length of enjoyment, tithe free, shall raise a presumption of a grant against a lay impropriator, because to allow such a presumption would be to allow, in effect, a prescription, (2 Scott, 1); and yet in every other case mere length of enjoyment is sufficient to found the presumption of a grant upon.

(25) See Hob. 309; 2 Jac. & W. 528; 2 Ea. & Yo. 189.

to tithes, by being always in spiritual hands: 5. By virtue of their order; as the knights templars, cistercians, and others, whose lands were privileged by the pope with a discharge of tithes [a]. Though upon the dissolution of abbeys by Henry VIII., most of these exemptions from tithes would have fallen with them and the lands become titheable again, had they not been supported and upheld by the statute 31 Hen. VIII. c. 13, which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them [26]. And from this original have sprung all the lands, which, being in lay hands, do at present claim to be tithe-free: for, if a man can shew his lands to have been such abbey lands, and also immemorially [27] discharged of tithes by any of the means before mentioned, this is now a good prescription *de non decimando*. But he must shew both these requisites [28]; for

How to prove exemptions.

[a] 2 Rep. 44; Seld. Tith. c. 13, s. 2.

(26) This provision is peculiar to that statute, and therefore all the lands belonging to the lesser monasteries, (i. e. such as had not lands of the clear yearly value of 200*l.*), dissolved by the 27 Hen. VIII. c. 28, are now liable to pay tithes. (Com. Dig. *Dism.*, E. 7).—[CHRISTIAN.] And in like manner are the lands belonging to the numerous alien priories and abbeys, dissolved in 1415, by the stat. 2 Hen. 5, liable to tithes. (See 2 Jac. & W. 528, 534). But the lands of the lesser monasteries which were surrendered after the 27 Hen. 8, c. 28, and of the knights of St. John, given to the king by the stat. 32 Hen. 8, c. 24, are within the 31 Hen. 8, c. 13, s. 21. (1 You. & C. 19; 6 Bac. Ab. 756).

(27) Where it was proved that land, belonging to one of the greater monasteries at the time of the dissolution, had long previously been in lay hands, this was held to destroy the claim of exemption, by proving that there had been no immemorial prescription by the monastery. (2 Jac. & W. 525).

(28) Mere non-payment of a particular species of tithe, or proof that no tithes in kind have ever been rendered within living memory, does not afford sufficient evidence of the exemption from tithe, (Gwill. 757; 1 Mad. R. 242; 4 Price, 16); but the party insisting on the exemption, must shew the ground of discharge by deducing title from some ecclesiastical person, and thus shewing the origin of the exemption. (2 Co. 44; Bunb. 325, 345; 3 Anst. 762, 945; see 1 Russ. & M. 529). And the same rule applied where the claim of exemption was against a lay impropriator, as against an ecclesiastical rector; and against the former no presumption of a grant or conveyance of the tithes, so as to discharge the land, was entertained upon evidence of non-payment merely, for any length of time; further evidence was required pointing to some deed of grant. (2

abbey lands, without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey lands [29].

Scott, 1; 9 Bligh, 471). But tithes in lay hands, or belonging to a corporation aggregate, are now subject to the same limitation that regulates the enforcement of claims to other hereditaments, as well between two persons claiming the right to the tithes as between the tithe owner and the occupier. (Vide infra, p. 262).

(29) "By the fundamental principles of the common law, all land is equally charged with tithes; to suppose a single acre not charged is quite a mistake; from the earliest periods tithes were everywhere due to somebody; even in extra-parochial places they are payable to the king; and although when in spiritual hands no tithes were paid, that was from the rule "*ecclesia decimas non solvit ecclesiæ*," and not from any non-charge inherent in the land. The land was still liable, though the payment was suspended. These lands, being then liable at the common law, could be exempt only by some of the modes that have been mentioned; real composition, bull, order, unity of possession, grant, or prescription." (Per Sir T. Plumer, M.R., 2 Jac. & W. 528). The fact of exemption will, however, be presumed upon proper evidence, in favour of lands shewn to have been abbey lands, within the stat. 31 Hen. 8. Upon proof of usage of *non decimando* in modern times, in respect of such lands, if unopposed or not effectually controverted by evidence of a contrary usage in earlier times, it would be inferred that the lands had been held exempt from tithe, at the time of the dissolution of the monastery to which they were proved to have belonged. But such proof would not avail against a terrier, survey, valuation, account, or other evidence of more ancient date. No time of definite duration was fixed by law, which should carry with it a title to exemption in spite of more ancient evidence to the contrary. (See 1 Hare, 203; 1 Sim. 280; 1 You. & J. 94; 1 Russ. & M. 529). In this state of the law, Lord Tenterden's act (2 & 3 Will. 4, c. 100), was passed, under the title of "*An Act for shortening the time required in claims of modus decimandi or exemption from a discharge of tithes.*" The preamble is as follows:—"Whereas the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented *by shortening the time* required for the valid establishment of claims of a modus decimandi, or exemption from or discharge of tithes;" it then enacts, that "all prescriptions and claims of or for any modus decimandi, or of or to any exemption from or discharge of tithes by composition real or otherwise," shall be sustained and be deemed good and valid in law, where tithes in kind shall be demanded by any corporation sole (other than the Crown), upon evidence shewing the payment of the modus, or in case of claim to exemption or discharge, the enjoyment of the land without render of tithes or anything in lieu thereof, during sixty years or such greater period as shall include two incumbencies, and the three years next following the commencement of a third incumbency. But proof that the modus was rendered or exemption enjoyed under some express agreement in writing, will be sufficient to defeat the general claim.

In the case of a claim of tithes in kind by the Crown, or by any person or corporation not being a corporation sole, it must be shewn that the modus was paid, or enjoyment had, during thirty years next preceding the de-

III. Right of common.

III. Common, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit [30]

mand, unless some payment or render inconsistent with the claim of modus or exemption can be proved to have taken place at some time prior to the thirty years. But if the proof of enjoyment or render of modus be carried back for sixty years, the claim shall be deemed absolute and indefeasible, unless it appear that some agreement in writing was the origin of the modus or exemption.

The 2nd section of the act confines its operation to cases where the modus, exemption, or discharge shall be proved to have existed, and been acted upon at or within one year before the passing of the act; but as tithe will be altogether commuted before the expiration of sixty years from the passing of the act, this singular restriction will have no very important operation. The act contains also special provisions for cases of temporary exemption under leases, &c., unity of enjoyment, and disabilities.

The 7th section enacts, that, in an action or suit, it shall be sufficient to allege that the modus, or exemption, or discharge claimed was actually exercised and enjoyed for such of the periods mentioned in the act as may be applicable to the case; and any proviso, exception, disability, contract, agreement, deed, or writing mentioned in the act, or any other matter of fact or law, not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, must be specially pleaded.

(Tithes not belonging to a spiritual or eleemosynary corporation sole, are also within the provisions of the Statute of Limitations, 3 & 4 Will. 4, c. 27).

Very opposite constructions have been put upon the most important enactment of the above statute by different judges. On the one hand, it is contended that the end expressed in the preamble, namely, the shortening of the time required for the proof of claims of modus or exemption, is the only end contemplated by the act, and that all other matters required to be proved must still be proved as before; so that the act merely prevents the party claiming the tithes from rebutting the presumption which arises from enjoyment without render of tithes in kind by evidence anterior to the commencement of the sixty years, without relieving the party who sets up a modus or exemption from the necessity he was always under of giving other evidence from which to infer some legal origin of his claim, which evidence must necessarily, in cases of claim to exemption, be of facts of great antiquity. On the other hand, it has been said, that the proof of enjoyment for the period mentioned in the act is alone sufficient to

Common.—Easement.

(30) The proper description of a common is, that it is a profit *à prendre*, a right to take or sever something valuable from the land of another; and this distinguishes it from mere easements, which are rights merely to use or interfere with the enjoyment of another's property. Thus, a right of way, a right to free air, light, &c. is an easement. A right to wash and water cattle at a pond, and to take thence water for domestic purposes has been held to be a mere easement. (5 Ad. & El. 758; 1 Nev. & P. 172. See 3 Ad. & El. 554; 3 Nev. & P. 257; 7 Mee. & W. 63). The distinction has been rendered important by the recent Statute of Prescriptions. (Vide infra, p. 263). Another peculiarity of a right of common is, that it implies no duty on the part of the owner of the soil, beyond the negative duty of permission; it lies, in the old phrase, not in *render*, like a rent, but merely in *prendre*.

which a man hath in the land of another; as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like [b].

[b] Finch, Law, 157.

entitle a party to exemption from tithes, —a construction which would give to the act the effect not merely, according to its title and preamble, of shortening the time required in claims of this nature, but of actually allowing a prescription, where formerly none was possible, under any circumstances, or upon any evidence of enjoyment. In the case of *Salkeld* v. *Johnston*, (1 Hare, 196), a vicar had filed the bill for an account of tithes of turnips, potatoes, and artificial grasses not made into hay and other green crops. The defendants relied simply on non-render within the time mentioned in Lord Tenterden's act. It was proved that the rector had received great tithes, and that the vicar had received tithes of some titheable matters arising within the parish different from the matters claimed in the bill. Sir J. Wigram, V. C., held, that the defence was not sufficient, on the general ground that the act did not dispense with the necessity of shewing that there was some legal ground of exemption, i. e. a title derived from some of the greater monasteries, and on the special ground that the titheable matters claimed were unknown in England until long after the time of legal memory, whereas it was admitted that the land was liable to the render of tithes in kind of all other titheable matters, while the exemption claimed under the act must be on the ground of a supposed contract commencing before the time of legal memory. Such a contract, namely, not to pay tithes of titheable matters to be thereafter introduced, would be void for want of consideration, being a contract to take part in consideration of the whole, although a modus for all tithes of matters of whatever kind produced by the land would be good.

In the case of *Fellowes* v. *Clay*, Q. B. 1843, (7 Jurist, 343), the party claiming exemption proved non-payment of tithes during the requisite period, but alleged no other ground of exemption; and, after two arguments, the Court was divided in opinion whether this was sufficient; Denman, C. J., and Williams, J., holding that the claim to exemption under the statute was good; Coleridge and Patteson, JJ., holding that it was not, on the ground that the preamble to the act shewed that it was intended to remedy the expense and inconvenience of suits for tithes, by shortening the time required for the valid establishment of claims of a modus or exemption; that, beyond shortening the time, the act was not intended to operate, and that the enacting part was consistent with this construction. The consequence which would follow from this construction is, that the objections of uncertainty, identity, &c., may still be urged against a modus set up under the act.

An objection to the more limited construction of the act, which appears to be not without weight, though it was not urged in either of the above cases, is, that, if the act merely restrains the tithe-owner from offering evidence older than sixty years to rebut a presumption arising from sixty years enjoyment, and leaves the law otherwise unaltered, there seems to be no reason why it should be enacted that proof of thirty years' enjoyment should raise a primâ facie case, for that is nothing more than the rule at common law.

In the above-mentioned case of *Salkeld* v. *Johnston*, Sir J. Wigram, V. C., expressed an opinion that the objection of rankness against a claim of modus would still be open under the act. But this position may be controverted without denying the correctness of the general construction for which his Ho-

And hence common is chiefly of four sorts: common of pasture, of piscary, of turbary, and of estovers.

nour contended; because the rankness of a modus is a matter of evidence merely, used to raise a presumption that the modus had its origin subsequently to the commencement of legal memory; but when the act expressly denies effect to the most direct evidence of the same fact, it would be absurd to admit a mere presumption.

Commutation of Tithes.

Provision has been made by several recent acts of Parliament for the gradual but certain and universal commutation of tithes throughout England and Wales, either by voluntary agreement or by compulsion. The principal statute is the 6 & 7 Will. 4, c. 71, amended by the 7 Will. 4 & 1 Vict. c. 69, 1 & 2 Vict. c. 64, 2 & 3 Vict. c. 62, 3 & 4 Vict. c. 15, 5 Vict. c. 7, and 5 & 6 Vict. c. 54. There is another act for Ireland, 1 & 2 Vict. c. 109; 3 & 4 Vict. c. 13.

The management of the commutation is entrusted to three commissioners, with a common seal, two appointed and removable by the Secretary of State, and the other by the Archbishop of Canterbury, and to twelve assistant commissioners, appointed by the chief commissioners.

The end proposed by the act is to substitute for all tithes, moduses, and compositions real, and also (by stat. 2 & 3 Vict. c. 62, s. 9) Easter offerings, mortuaries, surplice fees, tithes of fish, and mineral tithes, not already commuted, a corn-rent, payable half-yearly in money, the amount of which is regulated by the current price of fixed equal quantities of wheat, barley, and oats, which quantities were ascertained in the first instance by reference to the average prices of those grains during the seven years ending at Christmas, 1835. The fluctuating amount of the rent-charges is to be determined by reference to the current seven years' averages directed to be annually published in the London Gazette by the controller of corn returns.

1. Voluntary commutations by parochial agreements are to be made at meetings of land and tithe-owners, called by the owners of one-fourth in value of the lands or tithes within the parish; and agreements for commutation (containing certain prescribed particulars) made at such meetings with the consent of the owners of two-thirds of the lands subject to tithes, and of two-thirds of the owners of great and small tithes respectively, are to be binding on all parties, after confirmation by the tithe commissioners. If the tithe-owner be an archbishop or bishop, the consent of the crown, and if he be the incumbent of any other benefice or ecclesiastical dignity, the consent of the patron, is required; and, in the latter case, opportunity is to be afforded to the bishop of the diocese to give his advice and opinion to the commissioners previously to their confirmation of the agreement.

In lieu of a rent-charge in respect of any particular lands, the parties are empowered to give to any ecclesiastical owner lands not exceeding in the whole twenty acres in each parish. (See stat. 5 & 6 Vict. c. 54).

The amounts of the rent-charges are to be ascertained according to prescribed rules, by valuers appointed at a parochial meeting.

2. The act was passed on the 13th August, 1831, and the commissioners were directed, after the 1st of October, 1838, to proceed to compulsory commutation of tithes in all parishes where no voluntary agreement had been made and confirmed; and rules are laid down by which the amounts of the rent-charges for each parish are to be ascertained. Provision is made for affording to all parties interested, opportunity of

1. Common of pasture is a right of feeding one's beasts on another's land: for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross [c]. 1. Of pasture.

Common *appendant* is a right, belonging to the owners or occupiers of arable land [31], to put commonable beasts upon the lord's waste, and upon the lands of other per- Appendant.

[c] Co. Litt. 122.

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making objections to the award of the commissioners, before it is confirmed.

After the commissioners have confirmed their award, the apportionment of the rent-charge among the different land-owners and tithe-owners is to be ascertained within six months, by valuers appointed at parochial meetings, and, in case the apportionment is not completed within that time, it is to be made by the commissioners.

There are special provisions for particular cases, such as disabilities, the apportionment of the total rent assessed upon one land-owner among different portions of his lands, &c.

The lands are exempted from rent-charge in all cases of spiritual occupation or otherwise, in which they would have been temporarily exempted from tithes before the commutation; but no merger is to be occasioned by unity of possession or otherwise, except where the commutation rent is held in fee-simple or tail, and the owner shall execute a release or disposition by deed, to be confirmed by the commissioners. The stats. 1 & 2 Vict. c. 64, and 2 & 3 Vict. c. 62, extend this power of merger to copyholds, and confer it on "any person or persons who shall either alone or together be seised of or have the power of acquiring or disposing of the fee-simple in possession of any tithes or rent-charge in lieu of tithes," —a tenant for life and the remainderman in tail, for example. When the tithes, and the lands charged with them, are settled to the same uses, the tenant for life may effect a merger. Any charges which may affect the commutation rent, in case of merger, are to be primary charges on the land, subject to a power of specially apportioning such charges on particular parts of such lands in lieu of the whole. The last-mentioned act provides also for the merger of commutation rents charged on glebe lands.

The stat. 3 & 4 Vict. c. 15, authorizes the commissioners, under particular circumstances, to exempt small portions of land occupied as lawns or gardens, and small tenements, whereof, on account of its small value, tithe has not been claimed during seven years.

After the apportionment of any part of the rent-charge has been confirmed, it may be altered by the local commissioners of land-tax, with the consent of two justices of the peace.

(31) Common *appendant* belongs only to arable land, and cannot be claimed for more cattle than are necessary to plough or manure the tenant's arable land. Levancy and couchancy are incident to common appendant as well as appurtenant. (Willes, 227, 231; 1 B. & Ad. 710; 5 T. R. 46; 2 Mood. & R. 205). But where a farm contains pasture, it may be presumed, if there is evidence of usage, that it was all originally arable. (Bac. Ab., *Common*, (A. 1); 4 Rep. 37. See 5 Taunt. 244).

sons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground[32]. This is a matter of most universal right: and it was originally permitted[d], not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lords' wastes, and on the uninclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident to the grant of the lands; and this was the original of common appendant: which obtains in Sweden, and the other northern kingdoms, much in the same manner as in England[e]. Common *appurtenant* ariseth from no connexion of tenure, nor from any absolute necessity: but may be annexed to lands in other lordships[f], or extend to other beasts beside such as are generally commonable; as hogs, goats, or the like, which neither plough nor manure the ground. This, not arising from any natural propriety or necessity, like common appendant, is therefore not of general right; but can only be claimed by immemorial usage and prescription[g], which the law esteems sufficient proof of a special grant or agreement for this purpose[33]. Common *because of vicinage*, or neighbourhood, is where the inhabitants of two

Appurtenant.

Par cause de vicinage.

[d] 2 Inst. 86.
[e] Stiernh. de Jure Sueonum, l. 2, c. 6.
[f] Cro. Car. 482. 1 Jon. 397.
[g] Co. Litt. 121, 122.

(32) That is to say, horses, kine, and sheep.

(33) It may be created by modern grant. (15 East, 116). "Appendants," says Lord Coke, "are ever by prescription, but appurtenants may be created in some cases at this day." (Co. Litt. 121. b.) And, therefore, in pleading common appendant, it is unnecessary to add the usual form of prescribing, for that is implied. (Id. 122. a. See 8 Rep. 157; Cro. Car. 482). As to the time now requisite to establish a title by prescription, see infra, p. 265.

If a tenant, entitled to common appendant, purchase part of the land over which he has the right of common, this is no extinguishment of his right over the rest; but it is said to be otherwise of common appurtenant. (1 Bac. Ab. 628; 4 Rep. 38; 8 T. R. 401). And yet common appurtenant may be apportioned by division of the land to which it is annexed, (4 Rep. 38; 8 Id. 79; 2 B. & Ad. 168); and thus, by circuity, may be destroyed in part.

townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind[34]. Neither hath any person of one town a right to put his beasts originally into the other's common: but if they escape, and stray thither of themselves, the law winks at the trespass[h 35]. Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person[36]; being granted to him [34]

In gross.

[h] Co. Litt. 122.

(34) See 13 East, 348.

(35) See 6 Scott, 172, 440.

(36) Levancy and couchancy is therefore not incident to a right of common in gross, for it may be for any certain and definite number of cattle.

An unlimited right to pasture cattle in an open field is rather a right to take all the herbage, and is a sole and several pasturage, which may be claimed by prescription, and is assignable. (Co. Litt. 122; 6 Mee. & W. 541; 5 Taunt. 244; 4 Scott, N. R. 356). A right of common in gross, "as the going of two head of cattle on a common," is a tenement within the statute 13 & 14 Car. 2, (7 T. R. 671; 2 Nol. P. L. ch. 23, s. 2).

Cattle-gates (which are common in the north) seem to differ from common of pasture, for the owners of them have a joint possession and a several inheritance, and have an interest in the soil itself, and they are conveyed by lease and release. (1 T. R. 137). An ejectment will lie for a *beast-gate* in Suffolk, (signifying land and common for one beast), (2 Stra. 1084); and so for a cattle-gate. (2 T. R. 452; Rep. T. Hardw. 167; Sel. N. P., *Ejectment*, 3, n. 8; 6 Mee. & W. 541).

If A. and all those whose estate he has in the manor of D., have had from time immemorial a *fold-course*, that is, common of pasture for any number of sheep not exceeding 300, in a certain field as appurtenant to the manor, he may grant over to another this fold-course, and so make it in gross, because the common is for a certain number, and by the prescription the sheep are not to be levant and couchant on the manor. (1 Rol. Ab. 402, pl. 3; Cro. Car. 432; Sir W. Jones, 375; 2 Vent. 139).

Common appendant and appurtenant are limited, as to the number of cattle, either to an express number, or by levancy and couchancy, sometimes termed common without number. (Willes, 232). By common without number, is not meant common for any number of beasts which the commoner shall think fit to put into the common, but it is limited to his own commonable cattle *levant and couchant* upon his land (that is to say, as many cattle as the produce of the land of the commoner in the summer and autumn can keep and maintain in the winter). (1 B. & Al. 711; 2 M. & R. 205). And as it is uncertain how many in number these may be, there being in some years more than in others, it is therefore called common without number, as contradistinguished from common li-

and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

Limited as to number or time, or without stint.

All these species of pasturable common may be, and usually are, limited as to number and time: but there are also commons without stint [37], and which last all the year. By the statute of Merton, however, and other subsequent statutes [i], the lord of a manor may inclose so much of the waste as he pleases, for tillage or wood ground, provided he leaves common sufficient for such as are entitled thereto. This inclosure, when justifiable, is called in law, "approving:" an antient expression signifying the same as "improving" [k 38]. The lord hath the sole interest in the

[i] 20 Hen. III. c. 4, 29 Geo. II. c. 36, and 31 Geo. II. c. 41. [k] 2 Inst. 474.

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mited to a certain number, but still it is a common certain in its nature. (2 Brownl. 101; 1 Vent. 54; 5 T. R. 48; 8 Id. 396; 1 B. & Al. 706; 2 M. & Rob. 205; Selw. Ni. Pri. tit. *Common*). Therefore a plea, prescribing for common appurtenant to land for commonable cattle, without stating the number, or saying *levant and couchant*, as the case may be, is bad. (1 Saund. 28 b; Id. 343). For it shall be intended common without number, according to the strict import of the words, without any limitation whatsoever. (1 Rol. Abr. 398, pl. 3, 401, pl. 3; Hard. 117, 118; 2 Saund. 346, n. (1); 8 T. R. 396).—[CHITTY.]

In connexion with the subject of common may be mentioned the right which a man may have by special grant to the *vesture* or *herbage* of land, as distinguished from any right to the soil or to buildings or timber on it, including merely the corn, underwood, grass, &c. It is not clear whether this is an incorporeal hereditament or not. Lord Coke speaks of a grant by deed, and adds, that livery of seisin *secundum formam chartæ* will not pass the soil. (Co. Litt. 4. b.). The right to the vesture carries the right to the possession of the land, which may be recovered in ejectment, (Cro. Car. 362), and defended by action of trespass, (Co. Litt. 46; 5 T. R. 329; see 6 Mee. & W. 541); but a sale of growing crops of corn or other *emblements*, (*vide infra*, p. 122), is treated as a sale of chattels, conferring no interest in the land. (5 B. & Cr. 829; 4 Mee. & W. 343). Trees growing or to grow hereafter on particular lands may be granted separately from the land, and, from evidence of acts of ownership, a grant of such a freehold estate may be presumed. (14 East, 332; 8 Rep. 136 b; 11 Rep. 49 b; Cro. Jac. 27; 2 Mod. 185; 1 Lord Raym. 726).

(37) The notion of this species of common is exploded: a right of common without stint cannot exist in law. (Willes, 232; 1 Saund. 346; 8 T. R. 396; 2 Saund. N. S. 26). A right of pasturage without stint and in gross, is in fact a right, not of common, but of *exclusive* pasturage. (*Ante*, p. 34, n. (36)).

(38) The Statute of Merton, (20 Hen. 3, c. 4), mentioned in the text, enacted, that if, upon an assize brought by the

soil; but the interest of the lord and commoner in the common, are looked upon in law as mutual. They may both bring actions for damage done, either against strangers, or each other; the lord for the public injury, and each commoner for his private damage [1] [39].

2, 3. Common of *piscary* is a liberty of fishing in another 2 & 3. Common of

[1] 9 Rep. 113.

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tenants of a manor for their common of pasture, it was found that they had as much pasture as sufficed to the tenements, together with free egress and regress from their tenements to the pasture, they should be contented therewith. And this enactment, which applied only to common appendant, was extended to common appurtenant by the Statute of Westm. 2nd, (13 Edw. 1, c. 46), but not to common by special grant or feoffment; and the same statute authorized inclosures for the purpose of erecting windmills, sheepcotes, dairies, &c., or for the enlargement of a court or necessary curtilage. (See 3 & 4 Edw. 6, c. 3; 2nd Inst. 85, 473, 476; 3 T. R. 445; 7 B. & Cr. 364; 9 Id. 671; 9 Mee. & W. 830). Inclosures of commons are usually made by authority of local acts of Parliament framed with reference to the provisions of the General Inclosure Act, (41 Geo. 3, c. 109), amended by the 1 & 2 Geo. 4, c. 23, 3 & 4 Will. 4, c. 87, and 3 & 4 Vict, c. 41; and inclosures may be effected under special circumstances without a particular act, under the authority of the statutes 6 & 7 Will. 4, c. 115, and 3 & 4 Vict. c. 41. See also 26 Geo. 3, c. 36; 13 Geo. 3, c. 81; 31 Geo. 3, c. 41.

"See, as to approving, Com. Dig. *Common;* Selw. N. P. *Common;* 1 Saund. 346. Any person, who is seised in fee of part of a waste, may approve, besides the lord of the manor, provided he leaves a sufficiency of common for the tenants of the manor, but not otherwise, without consent of homage. (1 Stark. 102; 3 T. R. 445).

"It seemed to have been generally understood that the lord could not approve, where the commoners had a right of turbary, piscary, of digging sand, or of taking any species of estovers upon the common. (1 Taunt. 435; 2 T. R. 391). But it is now decided, agreeably to the general principles of the subject, that where the tenants have such rights, they will not hinder the lord from enclosing against the common of pasture, if sufficient be left, for this is a right quite distinct from the others, (7 B. & Cr. 371; 9 Id. 671); but if by such enclosure the tenants are interrupted in the enjoyment of their rights of turbary, piscary, &c., then the lord cannot justify the approvement in prejudice of these rights. (6 T. R. 741; Willes, 57). The right of the commoners to the pasturage may be subservient to the right of the lord; for if the lord has immemorially built houses or dug clay-pits upon the common without any regard to the extent of the herbage, the immemorial exercise of such acts is evidence that the lord reserved that right to himself, when he granted the right of pasturage to the commoners. (5 T. R. 411). If a lord of a manor plant trees upon a common, a commoner has no right to cut them down. His remedy is only by an action. (6 T. R. 483; 1 Bos. & Pul. 14)."—[CHRISTIAN.]

(39) A severance of the wastes from the manor does not destroy the rights of the commoners. (2 T. R. 415; 8 Id. 396).

piscary and turbary.

man's water: as common of *turbary* is a liberty of digging turf upon another's ground [m]. There is also a common of digging for coals, minerals, stones, and the like [40]. All these bear a resemblance to common of pasture in many
[35] respects; though in one point they go much farther; common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and those aftermentioned, are a right of carrying away the very soil itself [41].

4. Common of estovers.

4. Common of estovers or *estouviers*, that is, *necessaries*, (from *estoffer*, to furnish), is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word, *bote* [42], is used by us as synonymous to the French *estovers*: and therefore house-bote is a sufficient allowance of wood, to repair, or to burn in, the house; which latter is sometimes called fire-bote; plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry: and hay-bote, or hedge-bote, is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary [n 43].

These several species of common do all originally result from the same necessity as common of pasture; *viz.* for the maintenance and carrying on of husbandry; common of

[m] Co. Litt. 122. [n] Co. Litt. 41. [11 Rep. 46 b.]

(40) See 2 T. R. 391; 6 T. R. 748, as to the right to dig sand or gravel for repairs—a species of common of estovers.

(41) "Common of turbary cannot be appendant to land but to a house, as it was held in 5 Ass. 9, for the thing which is appendant ought to agree with the nature and quality of the thing to which it is appendant, and turves are to be spent in a house." (*Tyrringham's case*, 4 Rep. 37). And the commoner can only take turf for the use of the house to which the right is appendant. (Noy, 145; 3 Atk. 189; 1 Sch. & Lef. 8; 7 East, 127).

(42) "Saxonic. *Emendatio, refectio, restauratio; compensatio.*" (Spelm. Gloss. voce). To *boot*, is to help or mend any matter. From the French equivalent came our old-fashioned use of the word *stuff* for furniture.

(43) A tenant's right of taking estovers is of course not a right of *common*. (*Vide infra*, p. 122).

piscary being given for the sustenance of the tenant's family: common of turbary and fire-bote for his fuel; and house-bote, plough-bote, cart-bote and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

IV. Private rights of way.

IV. A fourth species of incorporeal hereditaments is that of *ways*; or the right of going over another man's ground. I speak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be grounded on a special permission; as when the owner of the land grants to another a liberty of passing over his grounds, to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company [o]. A way may be also by prescription: as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose; for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created[44]. A right of way may also arise by act and operation of law: for if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come at it; and I may cross his land for that purpose without trespass [p]. For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same [q][45]. By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the

By grant.

[36]

By prescription.

Of necessity.

[o] Finch, Law, 31. [p] Ibid. 63. [q] Co. Litt. 56.

(44) This is an instance of a way by *custom*, not by prescription. (See p. 263).

(45) See 4 Mau. & S. 293; 6 Mee. & W. 172. A right of way, thus arising from the necessity of the case, ceases with that necessity; as where by the purchase of land the party claiming the way obtains complete access through his own property. (9 J. B. Moore, 166; 7 Scott, 189).

road was out of repair, he who had the right of way might go over any part of the land he pleased: which was the established rule in public as well as private ways. And the law of England, in both cases, seems to correspond with the Roman [r] [46].

[r] Lord Raym. 725. 1 Brownl. 212. 2 Show. 28. 1 Jon. 297.

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(46) In the absence of specific stipulation this is not so, at least as to ways by prescription or grant and not of necessity, for at common law whoever has the use of a thing ought to repair it. Highways are governed by a different principle; they are for the public service, and if the usual track is impassable, it is for the general good that people should be entitled to pass in another line. (Doug. 748; 4 Mau. & S. 387).

On the subject of ways, see Gale and Whatley on Easements.

A way is an example merely of an *easement*, which, as has been said, (*ante*, p. 32, n. 30), is a right to make use of another's land, or in some way to control his use of it, not amounting to a right either of exclusive possession, or of taking any tangible profit therefrom; water whether standing or running not being considered a profit. In the work already referred to, easements are described in the following manner:—

"1stly. Easements are incorporeal.

2ndly. They are imposed upon corporeal property.

3rdly. They confer no right to a participation in the profits arising from it.

4thly. They must be imposed for the benefit of corporeal property.

5thly. There must be two distinct tenements; the dominant to which the right belongs, and the servient upon which the obligation is imposed."

In commenting upon the fourth proposition, the learned writers observe, that personal rights bearing a resemblance to easements, such as rights of way in gross, as they are called, which may be conferred by actual grant independently of the possession of any tenement by the grantee, do not possess the incidents of proper easements, and that the remedy, in case of disturbance of a personal right thus given, would appear to be upon the contract only. Thus, in 21 Ed. 3, 2, pl. 5, Shars, J., said, "Suppose I grant to you a way over my land to a certain mill, and you are not seised of this mill at the time, but you purchase it afterwards, notwithstanding I disturb you in this way afterwards, you shall not have assize, though you may have a writ of covenant." But ways in gross are always spoken of in the books as actual easements and hereditaments; and it was settled, that, for a way in gross, a writ on the case would lie, which could not be if it rested merely on contract; and in the case of a way by prescription to a church, the reason why assize did not lie, but only case, was, that the claimant had no freehold in the church. (4 Ed. 3, *Nusance*, 8). And for a tenant for years or against a stranger, the only remedy was case. (See Bac. Ab., *Chimin;* 1 T. R. 560).

The same writers enumerate the following instances of easements, which they divide into negative and affirmative:—Of the former kind are rights of way; right to discharge a stream of water either in its natural state, or changed in quantity or quality; right to discharge rain-water by a spout or projecting eaves; right to support from a neighbouring wall; right to carry on an offensive trade; right to hang clothes on lines passing over the neighbouring soil; right to bury in a particular

V. Offices. V. Offices, which are a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments; whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like[47]. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only: save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators[s]. Neither can any *judicial* office be granted in reversion: because, though the grantee may be able to perform it at the time of the grant; yet before the office falls, he may become unable and insufficient: but *ministerial* offices may be so granted[t]; for those may be executed by deputy[48]. Also, by statute 5 & 6 Edw. VI. c. 16, no public office (a few only excepted) shall be sold, under pain of disability to dispose of or hold it[49]. For the law presumes that he, who buys an office, will by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public.

[37]

[s] 9 Rep. 97. [t] 11 Rep. 4.

vault. Of the latter kind are right to receive a flow of water, (i. e. to prevent one's neighbour from diverting it); right to receive light and air by ancient windows, &c., (i. e. to prevent one's neighbour from obstructing one's light or air); right to support of neighbouring soil.

An easement can only be gained by express grant, which must be by deed, or by prescription, or, of modern times, by such a length of uninterrupted enjoyment (namely, for twenty years, or, under certain circumstances, a longer period, vide infra, p. 263), as raises a presumption of a grant by deed, which has been lost. In either case the right, if appendant to a tenement, may be transferred by any mode of conveyance which will pass the tenement itself; but if it be a right in gross, a deed is necessary to pass it. (6 Rep. 43; 5 B. & Ad. 1).

(47) As to offices in general, see Com. Dig., Cruise Dig., tit. *Offices*.

(48) By usage and custom a judicial office may be granted in reversion, (Hardr. 357); and there are instances of offices granted for years; to which form of grant, indeed, there is no more objection than to a grant in fee. (Hardr. 46, 357; 2 Show. 171).

(49) Scotland and Ireland have been brought within the operation of this statute by the stat. 49 Geo. 3, c. 126, which also includes, with a few exceptions, all offices in the gift of the crown or of the East India Company, and makes it a misdemeanor to be concerned in buying or selling any such office. (See 6 Geo. 4, cc. 82, 83; 11 Geo. 4, c. 20, s. 47; 2 B. & Cr. 674; 4 Ves. 815; 3 You. & J. 136; 3 T. R. 681; 6 J. B. Moore, 28; 8 Cl. & Fin. 295).

VI. Dignities.

VI. Dignities bear a near relation to offices. Of the nature of these we treated at large in the former book [u]: it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

VII. Franchises.

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms: and their definition is [v], a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant; or, in some cases [50], may be held by prescription, which, as has been frequently said, presupposes a grant [51]. The kinds of them are various, and almost infinite: I will here briefly touch upon some of the principal; premising only, that they may be vested in either natural persons or bodies politic; in one man or in many; but the same identical franchise, that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant [w].

Different kinds enumerated.

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise, for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are—to hold a court leet: to have a manor or lordship; or, at least, to have a lordship paramount: to [38] have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas, and trying causes: to have the cognizance of pleas; which is a still greater liberty, being an exclusive right, so that no other court shall try causes

[u] See Book I. ch. 12. [v] Finch, L. 164.
[w] 2 Roll. Abr. 191. Keilw. 196.

(50) Such franchises as cannot be enjoyed without matter of record, cannot be claimed by prescription; for a record cannot be presumed from such evidence. Such are rights to deodands and to the goods of felons, to make a corporation, to make a coroner, &c. (Co. Litt. 114. a.). The stat. 9 Geo. 3, c. 16, which limits the claims of the crown to sixty years, expressly excepts franchises and liberties.

(51) See 2 You. & J. 285; 3 Burr. 1812.

arising within that jurisdiction: to have a bailiwick, or liberty exempt from the sheriff of the county; wherein the grantee only, and his officers, are to execute all process: to have a fair or market [52]; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls must have a reasonable cause of commencement, (as in consideration of repairs or the like), else the franchise is illegal and void[x 53]; or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty; which species of franchise may require a more minute discussion.

Forests. As to a *forest:* this, in the hands of a subject, is properly the same thing with a chase; being subject to the common law, and not to the forest laws[y 54]. But a *chase* differs Chases. from a park, in that it is not inclosed, and also in that a man may have a chase in another man's ground as well as in his own, being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. A Parks. *park* is an inclosed chase, extending only over a man's own grounds. The word *park* indeed properly signifies an inclosure; but yet it is not every field or common, which

[x] 2 Inst. 220. [y] 4 Inst. 314.

(52) As to the connexion between the right to the soil and the right to the franchise of a fair or market, and the power of removing a fair or market, see 7 Ad. & El. 95; 1 Wils. 107; 3 East, 538; 5 Ad. & El. 460. As to juries, see *Peter* v. *Kendal*, 6 B. & Cr. 703.

(53) For such franchises are restrictive on the public, and if they are disturbed or evaded, the grantee has a remedy, (see 4 T. R. 666; 5 Mee. & W. 375; 6 Id. 234); and therefore, also, he is bound to afford the public the full benefit of his franchise. (Willes, 510; Show. 231. See 2 Cl. & Fin. 513).

(54) But a subject may have a forest, with the privilege of forest courts and officers, by grant under the Great Seal. (Manwood, pl. 77, 88; Cro. Jac. 155). "The king, before the *charta de forestâ* could have made a forest wherever he pleased over the lands of his subjects; but after the boundaries of the district fixed upon were marked out and proclaimed by the sheriff, it was only a chase till proper officers were appointed, when it became a forest, and under the jurisdiction of the chief justice in eyre. (Manw. tit. *Forest*, pl. 7). A forest is not necessarily a chase in the hands of a subject; for it may be granted by the king, subject to the justice-seat and the forest laws, as the Duke of Lancaster, and Duke of Norfolk, and many other noblemen have had forests subject to the forest laws; but if the jurisdiction is not added in the grant, it becomes a chase, and trespassers in it are punishable only by the common law." (Ib. pl. 67, et seq.; 4 Inst. 314). —[CHRISTIAN.]

a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park: for the king's grant, or at least immemorial prescription, is necessary to make it so [z]. Though now the difference between a real park, and such inclosed grounds, is in many respects not very material: only that it is unlawful at common law for any person to kill any beasts of park or chase [a] [55], except such as possess these franchises of forest, chase, or park. *Free warren* is a similar franchise erected [56] for preservation or custody (which the word signifies) of beasts and fowls of warren [b]; which, being *feræ naturæ*, every one had a natural right to kill as he could; but upon the introduction of the forest laws, at the Norman conquest, as will be shewn hereafter, these animals being looked upon as royal game and the sole property of our savage monarchs, this franchise of free-warren was invented to protect them; by giving the grantee a sole and exclusive power of killing such game so far as his warren extended, on condition of his preventing other persons. A man therefore that has the franchise of warren, is in reality no more than a royal game-keeper; but no man, not even

Free warrens.

[39]

[z] Co. Litt. 233. 2 Inst. 199. 11 Rep. 86.

[a] These are properly buck, doe, fox, martin, and roe; but in a common and legal sense extend likewise to all the beasts of the forest: which, besides the other, are reckoned to be hart, hind, hare, boar, and wolf, and in a word, all wild beasts of venary or hunting. (Co. Litt. 233).

[b] The beasts are hares, conies, and roes; the fowls are either *campestres*, as partridges, rails, and quails; or *sylvestres*, as woodcocks and pheasants; or *aquatiles*, as mallards and herons. (Ibid.)*

(55) But see, *infra*, p. 419.

(56) A free warren may be granted at this day, though such grant is not usual. (Cruise Dig. tit. 34, s. 4).

* Upon the forest laws I should consider Manwood higher authority than Sir Edward Coke.

Manwood informs us that a forest is not a privileged place for all manner of beasts or fowls, but only for beasts of forest, chase, or warren, and no other, that is, for the hart, the hind, and the hare, which are beasts of the forest; the buck, the doe, the fox, which are beasts of the chase; the hare, the coney, the pheasant, and the partridge, which are beasts and fowls of warren, and no other. The game of free warren are such as may be taken with long winged hawks. (For. pl. 20, *Warren*). —[CHRISTIAN.] Grouse are not birds of warren. (7 B. & Cr. 36). In that case it was intimated that the enumeration by Manwood from the old authorities would not be extended.

a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of free warren [c] [57]. This franchise is almost fallen into disregard, since the new statutes for preserving the game; the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen sportsmen in antient times who have sold their estates, and reserved the free warren, or right of killing game, to themselves; by which means it comes to pass that a man and his heirs have sometimes free warren over another's ground [d]. A *free fishery*, or exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feodal polity has prevailed [e]; though the making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by King John's great charter: and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested [f]. This opening was extended by the second [g] and third [h] charters of Henry III. to those also that were fenced under Richard I.; so that a franchise of free fishery ought now to be at least as old as the reign of Henry II [58]. This differs from a *several* fishery; because he that has a several fishery must also be (or at least derive his right from) the owner of the soil [i], which in a free fishery is not requisite [59]. It differs also from a *common* of piscary before mentioned, in that the free fishery

Free fisheries.

Several fishery.

[40]

Common of fishery.

[c] Salk. 637.
[d] Bro. Abr. tit. Warren, 3.
[e] Seld. Mar. Claus. I. 24. Dufresne, V. 503. Crag. de Jur. feod. II. 8, 15.
[f] Cap. 47, edit. Oxon.
[g] Cap. 20.
[h] 9 Hen. III. c. 16.
[i] M. 17 Edw. IV. 6. P. 18 Edw. IV. 4. T. 10 Hen. VII. 24, 26. Salk. 637. [5 B. & Cr. 875].

(57) But the owner of a free warren neither kept nor killed the game for the use of the king. See, as to the doctrine that no one can by common law justify sporting on his own grounds, and as to the recent alterations of the law, *infra*, p. 419.

A grant of a free warren in a manor, and a separate grant of the manor, do not make the free warren appurtenant to the manor. (Cro. El. 547; 1 Ad. & El. 654).

(58) See *Williams* v. *Wilcox*, 8 Ad. & El. 314.

(59) But a subject may have by prescription a several fishery in an arm of the sea. (Per Lord Kenyon, 4 T. R. 439; 1 Camp. 312). And although, perhaps, if the terms of the grant be unknown, it will be presumed that the soil passed, yet a grant of a "several fishery," without more, does not pass the soil. (5 B. & Cr. 881). The con-

is an exclusive right, the common of piscary is not so: and therefore in a free fishery, a man has a property in the fish before they are caught; in a common of piscary not till afterwards[k]. Some indeed have considered a *free* fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the *several* fishery of the grantor[l]. But to consider such right as originally a flower of the prerogative, till restrained by *magna carta*, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription, and to distinguish it (as we have done) from a *several* and a *common* of fishery, may remove some difficulties in respect to this matter, with which our books are embarrassed. For it must be acknowledged, that the rights and distinctions of the three species of fishery are very much confounded in our law-books; and that there are not wanting respectable authorities[m] which maintain that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary.

VIII. Corodies.

VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance[n]. In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted[o]. And these may be reckoned another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance[60]. To these may be added,

IX. Annuities.

IX. Annuities, which are much of the same nature, only that these arise from temporal, as the former from spiritual persons. An annuity is a thing very distinct from a rent-

[41]

[k] F. N. B. 88. Salk. 637.
[l] 2 Sid. 8.
[m] See them well digested in Hargrave's notes on Co. Litt. 122.
[n] Finch, L. 162.
[o] See Book I. ch. 8.

sequence is material, for when the grantee has the soil, he has a corporeal hereditament which will pass without deed, but a mere fishery cannot be even demised for years. (Id.)

(60) A corody, notwithstanding its personal nature, cannot, any more than another incorporeal hereditament, be granted or transferred by an unsealed writing. (12 Hen. 4, 17; Finch, 162).

charge, with which it is frequently confounded: a rent-charge being a burthen imposed upon and issuing out of *lands*, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor [p]. Therefore, if a man by deed grant to another the sum of 20*l. per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity; which is of so little account in the law, that, if granted to an eleemosynary corporation, it is not within the statutes of mortmain [q]; and yet a man may have a real estate in it, though his security is merely personal [61].

[p] Co. Litt. 144. [q] Ibid. 2.

(61) An annuity is a sum payable by contract at regular consecutive periods, whether of greater or less extent than a year. Thus, a payment at intervals of twenty years has been held an annuity. [c] But a covenant with A. and his heirs to find a monk to serve a chapel every holiday, or to pay £5 for each default, was held not to be a grant of an annuity, on account of the uncertainty and irregularity of the payment. (Dyer, 24; Roll. Ab. *Annuity*). An annuity is a definite sum payable on fixed days, and if the event which is to put an end to the annuity happens in the interval between any two days of payment, nothing is payable at common law for the portion of the current period which has elapsed; and this distinguishes an annuity from interest for a debt, which accrues de die in diem, notwithstanding a contract for payment at fixed periods. (1 Swanst. 349, n.; 2 B. & Al. 802; Buck, 408). As to the apportionment of annuities in certain cases at common law and by statute, vide infra, p. 43, n. (69).

An annuity may be granted, as is said in the text, to a man and his heirs, and, whether such an annuity can properly be called a real estate or not, it is so far regarded as an incorporeal hereditament as to be held within the well-known rule, that an incorporeal hereditament cannot be granted or transferred without a deed. (Co. Litt. 144. b.; 14 Ves. 491; 2 D. & Ry. 603; 13 Price, 721). The characteristic of an annuity at common law was, that it was recoverable by writ of annuity, which was a personal action brought against the grantor or his heirs, (if the heirs were bound by the grant); and as even a rent-charge, or annual payment granted and made payable out of or chargeable upon land, was generally also accompanied by a personal contract to pay, the grantee had an option to choose either his real remedy against the land, or his personal remedy by action of annuity; but having once chosen his remedy, and treated the thing in question as an annuity, he could not afterwards treat it as a rent-charge and resort to the real remedy; or vice versâ. (Litt. s. 219). This and other inconveniences have occasioned this form of action to fall into disuse; and now annuities and rent-charges are always secured by bond or covenant, the remedy upon which is an action of contract, which does not estop the grantee from resorting at any future time to his remedy against the land, if the annuity has been charged upon land.

The better opinion seems to be, that, though an annuity may be limited to heirs, and may therefore be an here-

X. Rents.

X. Rents are the last species of incorporeal hereditaments. The word rent or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance[r]. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit;* yet there is no occasion for it to be, as it usually is, a sum of money: for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of rent[s]. It may also consist in services or manual operations; as, to plough so many acres of ground, to attend the king or the lord to the wars, and the like; which services in the eye of the law are profits. This profit must also be *certain;* or that which may be reduced to a certainty by either party. It must also issue *yearly;* though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year[t]: yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted[u] 62. It

[r] Co. Litt. 144.
[s] Ibid. 142.
[t] Ibid. 47.
[u] Plowd. 13. 8 Rep. 71.

ditament, and forfeitable for treasons, (7 Rep. 35), it has none of the other properties of a real hereditament. If it be granted to a man and his heirs in tail, it is not within the statute de donis, (infra, p. 113), but becomes absolute on the birth of issue. (1 Br. C. C. 324; Ambl. 782; 2 Ves. sen. 170). "If I by my deed for me and my heirs grant an annuity to a man and the heirs of his body, for that this only chargeth my person, and concerneth no land, nor savoureth of the realty, it is not an entail within the statute." (Co. Litt. 20. a.). And when certain formalities were necessary for the passing of real estate by will, which were not required in a will of personal estate, it was held that an annuity of inheritance passed as personal property by a will which was not sufficient to pass real estate. (4 B. & Al. 59. See *Taylor* v. *Martindale*, 5 Jurist, 648).

(62) Before the statute against subinfeudations, (infra, p. 91), the owner of the fee might have aliened in fee, reserving fealty, that is, creating a tenure between him and his alienor; and any duties to be performed by the tenant were called services. If a rent were reserved upon such a tenure it was a rent-service. Hence, all rent-services due at the present day from a tenant in fee simple must have been created before the statute Quia Emp-

must, lastly, issue out of *lands and tenements corporeal;* that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. Therefore a rent [42] cannot be reserved out of an advowson, a common, an office, a franchise or the like [w] [63]. But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt [x]: though it doth not affect the inheritance, and is no legal rent in contemplation of law.

There are at common law [y] three manner of rents, rent-service, rent-charge, and rent-seck. *Rent-service* is so called Rent-service, because it hath some corporal service incident to it, as at the least fealty or the feodal oath of fidelity [z]. For, if a tenant holds his land by fealty, and ten shillings rent, or by the service of ploughing the lord's land, and five shillings rent, these pecuniary rents being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrere, at the day appointed, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired [a]. A *rent-charge* is where the owner of the rent rent charge,

[w] Co. Litt. 144.
[x] Ibid. 47.
[y] Litt. § 213.
[z] Co. Litt. 142.
[a] Litt. § 215.

tores. At the present day, to create a tenure, the proposed lord must retain some reversion in himself, and therefore a rent-service can now only be reserved upon an alienation in tail, for life, or for years. Such a rent may be reserved upon a demise for years without deed. (Litt. sect. 214).

Of course a rent-service must be made payable to the owner of the reversion; if it be reserved to a stranger, although the reservation may be good by way of contract, in creating an annuity, it does not create a rent-service. (Hob. 130). If, indeed, the demise be for life, and the lessee execute the deed, the reservation may amount to a *charge* by him, which will give the stranger a good rent-charge or rent-seck.

(63) A rent may, however, be granted or reserved out of tithes, with all the incidents of a rent, except, from the necessity of the case, that of distress. (3 Wils. 25; 2 Saund. 303; stat. 5 Geo. 3, c. 17). And it is laid down that the Queen, by her prerogative, and the subject by statute, may have a rent out of an incorporeal hereditament. (Gilb. Rents, 20). But a rent cannot be reserved out of chattels personal, and if such chattels are demised with land at an entire rent, the rent issues out of the land only. (5 Rep. 17 b; 2 N. R. 224).

hath no future interest, or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrere or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-*charge*, because in this manner the land is charged with a distress for the payment of it[b] [64]. *Rent-sech, reditus siccus* or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress [65].

rent-seck.

Quit-rents,

There are also other species of rents, which are reducible to these three. Rents of *assise* are the certain established rents of the freeholders and antient copyholders of a manor[c], which cannot be departed from or varied. Those of the freeholders are frequently called *chief*-rents, *reditus capitales;* and both sorts are indifferently denominated *quit*-rents, *quieti reditus;* because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were antiently called *white*-rents, or *blanch-farms, reditus albi*[d]; in con-

[43]

[b] Co. Litt. 143.

[c] 2 Inst. 19.

[d] In Scotland this kind of small payment is called *blanch-holding*, or *reditus albæ firmæ*.

(64) Wherever a man by deed agrees that his land shall be charged with the payment of rent, and shall be liable to distress, this is a rent-charge; and if nothing said of distress, it is a rent-seck, provided the grantor's estate in the land is freehold, and the rent is granted for a freehold interest. And if the owner of a rent-service grant away the rent, reserving his reversion, or reserving fealty, this is a rent-seck in the hands of the stranger, although the tenant attorn. (Litt. sect. 225).

(65) The only remedy for a rent at common law was distress, assize, or action on the contract; the assize could only be brought after a *seisin* of the rent had been acquired by the receipt of some portion of it; and, therefore, where there was no clause of distress, and the grantor had never made any payment, there was properly no remedy for the *rent* whatever, though damages might have been recovered on account of the breach of contract; hence, the term *reditus siccus*.

A rent-service may be reserved out of a term of years demised; but a rent-seck is a rent granted out of a freehold estate, and for a freehold interest, that is, for life, at least; and, therefore, if a rent is granted out of an estate for years, without an express power of distress, the statute cited in the text (which mentions only rents-seck, rents of assize, and chief-rents) does not give any right to distrain.

tradistinction to rents reserved in work, grain, or baser money, which were called *reditus nigri*, or *black-mail*[e]. *Rack-rent* is only a rent of the full value of the tenement, or near it. A *fee-farm* rent is a rent-charge issuing out of an estate in fee; of at least one fourth of the value of the lands, at the time of its reservation[f]; for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee-simple instead of the usual methods for life or years[66].

rack-rent,

fee-farm rent.

These are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rents-seck, rents of assize, and chief-rents, as in case of rents reserved upon lease[g][67].

Remedies by distress.

Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation[h]: but in case of the king, the payment must be either to his officers at the Exchequer, or to his receiver in the country[i]. And strictly the rent is demandable[68] and payable before the time of sun-set of the day whereon it is reserved[k]; though perhaps not absolutely due till midnight[l][69].

Rents, where and when payable.

[e] 2 Inst. 19.
[f] Co. Litt. 143.
[g] Stat. 4 Geo. II. c. 28.
[h] Co. Litt. 201.
[i] 4 Rep. 73.
[k] Co. Litt. 302. 1 Anders. 253.
[l] 1 Saund. 287. 1 Chanc. Prec. 555. Salk. 578.

(66) Mr. Hargrave is of opinion, that the quantum of the rent is not essential to create a fee-farm, (Co. Litt. 144, n. 5); where he differs from Mr. Douglas, who had thought that a fee-farm was not necessarily a rent-charge, but might also be a rent-seck. (Doug. 605).—[CHRISTIAN.] See 5 M. & W. 261.

(67) That is, for such as had been paid for three years, within twenty years before the passing of that act, or for such as have been since created. (4 Geo. 2, c. 28, s. 5; Doug. 627, and n. 1).—[CHRISTIAN.]

(68) That is to say, where there is a clause of forfeiture in case the rent is not paid after demand, a demand at sunset is a good demand within the condition. (1 Saund. 287; 4 Taunt. 549).

(69) If the lessor dies before sunset on the day upon which the rent is demandable, it is clearly settled that the rent unpaid is due to his heir, and not to his executor; but if he dies after sunset and before midnight, it seems to be the better opinion, that it shall go to the executor, and not to the heir. (1 P. Wms. 178; Toller on Executors, 177-8).—[CHRISTIAN.] The distinction between sunset and midnight seems to be scarcely tenable. See 1 Saund.

to the third part of our commentaries, which will treat of civil injuries, and the means whereby they are redressed [70].

Apportionment.

any power, and all rents-charge, and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description made payable or becoming due at fixed periods, shall be apportioned, so that on the death of any person interested in any such rents, &c., or in the estate, fund, office, or benefice, from or in respect of which the same shall be issuing or derived, *or on the* determination by any other means whatsoever *of the interest of any such person*, he or his executors, administrators, or assigns, shall be entitled to a proportion of such rents, &c. according to the time which shall have elapsed from the commencement or last period of payment (as the

Mines.

(70) The right to *mines* has been sometimes treated as an incorporeal hereditament. Mines, whether opened or not, belong *primâ facie* to the owner of the soil, (Co. Litt. 4. a.); and a copyholder, although he cannot open mines, may bring an action of trespass against a stranger who enters the sub-soil from his own mine, without breaking the surface. (2 B. & Ad. 437). Mines of gold and silver are called royal mines, and belong to the Queen, as part of her prerogative of coining; and under this description are included mines of lead, tin, and copper, containing either of these precious metals. (Plowd. 336, 339; 16 Ves. 393). The hardships consequent upon the exercise of this prerogative at common law, have been somewhat alleviated by the statutes 1 W. & M. st. 1, c. 20, and 5 & 6 W. & M. c. 6.

A tenant for life or for years may work mines already opened, but if he break the surface for the purpose of searching for minerals, it is waste. Hence seems to have arisen the doctrine that a widow is dowable of open mines only. (1 Taunt. 482).

Mines may be conveyed, excepted, or reserved apart from the right to the surface: mines opened, as corporeal hereditaments, (1 Mee. & W. 210: Shepp. Touch. 96); mines unopened, or rather a license to dig for minerals, as incorporeal hereditaments. (6 Nev. & M. 441; see 3 Id. 497, n.; 4 Id. 505; 4 Leon. 147; 1 W. Bl. 483; 7 Scott, 855). This incorporeal hereditament or license is converted into an actual corporeal estate as soon as the mine is taken possession of and worked. (1 W. Bl. 482; 2 B. & Al. 724). But it seems that an actual estate may be had in unopened mines, being something distinct from and greater than a mere license to search for and obtain minerals, and that such estate may be conferred by a feoffment with a symbolical livery of seisin on the land; and it has been held that a right to an unopened mine cannot be prescribed for, not being an incorporeal hereditament, (*Wilkinson* v. *Proud*, 7 Jurist, 284); but the decision in that case seems to have turned on the frame of the pleadings, for the Court seemed to admit that the defendant might prescribe for a right to take the minerals.

A grant or reservation of a right of mining implies every right that is necessary for the convenient working of the mine, a right of entering and breaking the surface, a right of way to carry away the ore, &c.; but it implies no more. It allows no use of the surface, no deposit upon it to a greater extent or for a longer duration than is necessary, no attendance upon the land of unnecessary persons. It is questionable whether it would allow a deposit upon the land for the purposes of sale, and whether it would justify the introduction of purchasers to view the minerals. (2 B. & Cr. 211; 2 Lutw. 1247; 6 Mee. & W. 174).

case may be), with such remedies for recovering such apportioned parts, *when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before*, as he or they would have had for recovering such entire rents, &c. if entitled thereto; but so that persons liable to pay rents reserved by any lease or demise, and the lands, &c. comprised therein, shall not be resorted to for such apportioned parts specifically; but the entire rents shall be received by the person who, if the act had not passed, would have been entitled to such entire rents, and who shall be liable for the apportioned parts. The act concludes with a saving of express stipulations against apportionment, and of annual sums made payable in policies of assurance of any description.

The language seems so exclusively to contemplate *continuing* rents, &c., that there is great reason to doubt whether it would apply to cases where the rent, &c. itself, and the interest of the party in whose favour the apportionment is sought to be made, cease at the same moment; as, for instance, where an annuity is granted to A. during his life, or where a tenant in fee makes a lease for life, reserving rent. (See 4 Per. & Dav. 313).

Another important question upon the statute is, whether the words "on the determination by any *other* means of the interest of any such person," so control the effect of the preceding general reference to the death of any other person interested in the rent, &c., as to confine the meaning of those words to a death by which the interest (that is the estate) of such person does not, in a technical sense, continue; and so to exclude the death of a person entitled in fee-simple or in tail, because, in such case, the estate or interest of the party dying, both in the reversion and in the rent which is annexed to it, does not determine, but continues in his heir. Messrs. Coote and Hayes are of opinion that the words are so controlled, and consequently, where tenant in fee makes a lease, reserving rent on a particular day, and dies upon that day before midnight, his heir or devisee, and not his executor, shall have the rent; and similarly, that where a tenant in tail dies under similar circumstances, having made such a lease as by stat. 32 Hen. 8, c. 28, is binding on his issue, the issue in tail and not the executor shall have the rent. (Coote, Landl. and Ten. p. 273; 1 Hayes, Introd. Conv. 337, 5th ed.). On the other hand, it is said that the words referred to are not sufficient to control the general meaning of the word "death;" and that even were it otherwise, the words "determination of interest" are to be taken in their popular and not in the strict feudal sense above referred to. If Mr. Coote's construction is correct, many cases within the mischief contemplated by the act are left unprovided for. (See 2 Jarm. Conv. p. 336, 3rd ed.).

Apportionment.

Mr. Coote's position in the page above referred to, that, if tenant for life make a lease, under a power which enables him so to bind his successor in interest, and die under the like circumstances, the remainderman and not the executor shall have the rent, is unquestionably erroneous.

CHAPTER IV.

OF THE FEODAL SYSTEM.

Knowledge of the nature and doctrine of feuds essential.

IT is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom [1], or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feodal law: a system so universally received throughout Europe upwards of twelve centuries ago, that Sir Henry Spelman [a] does not scruple to call it the law of nations in our western world. This chapter will be therefore dedicated to this inquiry [2]. And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time misemployed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholarlike scientifical manner, without having recourse to the antient. Nor will these re-

[a] Of Parliaments, 57.

(1) An intimate acquaintance with the feodal system is absolutely necessary to the attainment of a comprehensive knowledge of the first principles and progress of our constitution. And this subject, in my opinion, might with great propriety have preceded the chapter upon Parliament. The authority of Lord Coke upon constitutional questions, is greatly diminished by his neglect of the study of the feodal law: which Sir Henry Spelman, who well knew its value and importance, feelingly laments: "I do marvel many times, that my Lord Coke, adorning our law with so many flowers of antiquity and foreign learning, hath not turned into this field, from whence so many roots of our law have, of old, been taken and transplanted." (Spelm. Orig. c. viii).—[CHRISTIAN.]

(2) Upon the subject of the feodal system, in addition to the authorities cited in the text, see Robertson's History of Charles V., vol. 1, and the masterly essay by Mr. Hallam in his History of the Middle Ages, ch. 2, part 2.

searches be altogether void of rational entertainment as well as use: as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendor.

[45]

Feudal system introduced by the northern nations into the south.

The constitution of feuds[b] had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the same *officina gentium*, as Crag very justly entitles it[c], poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries[3], and continued in their respective colonies as the most likely means to secure their new acquisitions: and, to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers[d]. These allotments were called *feoda*, feuds, fiefs or fees; which last appellation in the northern languages[e] signifies a conditional stipend or reward[f][4]. Rewards or stipends they evidently

[b] See Spelman, of Feuds, and Wright, of Tenures, *per tot.*

[c] De Jure Feod. 19, 20.

[d] Wright, 7.

[e] Spelm. Gl. 216.

[f] Pontoppidan, in his history of Norway, (page 290) observes, that in the northern languages odh signifies *proprietas* and all *totum*. Hence he derives the odhal right in those countries; and hence too perhaps is derived the *udal* right in Finland, &c. (See Mac Doual, Inst. part 2). Now the transposition of these northern syllables, allodh, will give us the true etymology of the *allodium*, or absolute property of the feudists; as, by a similar combination of the latter syllable with the word fee, (which signifies, we have seen, a conditional reward or stipend) feeodh or *feodum* will denote stipendiary property.

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(3) This does not appear to have been the case; the lands were held in common, and were annually divided and allotted, as Montesquieu observes: "Chez les Germains, il y avoit des vassaux, et non pas des fiefs. Il n'y avoit point de fiefs, parce que les princes n'avoient point de terres à donner, ou plutôt les fiefs étoient des chevaux de bataille, des armes, des repas. Il y avoit des vassaux, parce qu'il y avoit des hommes fidèles, qui étoient liés pas leur parole, qui étoient engagés pour la guerre, et qui faisoient, à peu près, le même service que l'on fit depuis pour les fiefs." (De l'Esprit des Loix, liv. xxx, chap. iii).

(4) This derivation is, perhaps, better than that which has been proposed from the initial letters of the vassal's oath, "Fidelis ero ubique domino vero meo;" but a sufficient objection to all Teutonic derivations of the word feud is con-

were: and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis* or oath of fealty [g]: and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them [h].

Duties of lord and vassal.

Allotments, thus acquired, naturally engaged such as accepted them to defend them: and, as they all sprang from
[46] the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command of, his immediate benefactor or superior; and so upwards to the prince or gene-

[g] See this oath explained at large in Feud. l. 2, t. 7.
[h] Feud. l. 2, t. 24.

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tained in the observation of Sir F. Palgrave,—that the word itself was never used in any Teutonic language, the Anglo-Saxon or German name for a feud being always *læn* or *lehn* (a *loan*), and for the feudal system *lehnwesen*. Our own word was adopted from the Norman, and was most probably of Latin origin. In Scotland, the letting of land for a long term of years, or in perpetuity, subject to the payment of a rent and forfeiture, and therefore upon terms closely resembling those of the original benefices or feuds, is to this day called *feuing*, and the rent *feu-duty*. Erskine (Principles of the Law of Scotland, book ii. tit. 4), speaking of this tenure, says, "It has a strong resemblance to the Roman *emphyteusis*, in the nature of the right, the yearly duty payable by the vassal, the penalty in the case of not punctual payment, and the restraint frequently laid upon the vassal not to alien without the superior's consent." Accordingly, Sir F. Palgrave with some probability derives the word from the *emphyteusis* of the civil law, pronounced *emphytefsis*, and gradually shortened and corrupted into *phitef* or *fitef*, and ultimately into *fief*, *fevodium*, *fevd*, or *feud*. (Rise and Progress of the Anglo-Saxons, Illustrations, p. ccv., et seq.). Emphyteusis was certainly, in the infancy of the feudal system, used with the same meaning as *precaria*, and *præstaria* or *præstita*, (the Latin translation of the Teutonic *lehn*); and these latter words signified the same thing with beneficia, the original feud.

ral himself: and the several lords were also reciprocally bound in their respective gradations, to protect the possessions they had given. Thus the feodal connexion was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole, and of every part of this their newly-acquired country [i]; the prudence of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests.

The system universal among the barbarous nations.

The universality and early use of this feodal plan among all those nations, which in complaisance to the Romans we still call barbarous, may appear from what is recorded [k] of the Cimbri and Teutones, nations of the same northern original as those whom we have been describing, at their first irruption into Italy about a century before the christian æra. They demanded of the Romans, "*ut martius populus aliquid sibi terræ daret, quasi stipendium: cæterum, ut vellet, manibus atque armis suis uteretur.*" The sense of which may be thus rendered: they desired stipendiary lands (that is, feuds) to be allowed them, to be held by military and other personal services, whenever their lord should call upon them. This was evidently the same constitution, that displayed itself more fully about seven hundred years afterwards; when the Salii, Burgundians, and Franks broke in upon Gaul, the Visigoths on Spain, and the Lombards upon Italy; and introduced with themselves this northern plan of polity, serving at once to distribute and to protect the territories they had newly gained. And from hence too it is probable that the emperor Alexander Severus [l] took the hint, of dividing lands conquered from the enemy among his generals and victorious soldiery, duly stocked with cattle and bondmen, on condi-

[47]

[i] Wright, 8.

[k] L. Florus, l. 3, c. 3.

[l] "*Sola, quae de hostibus capta sunt, limitaneis ducibus et militibus donavit; ita ut eorum ita essent, si haeredes illorum militarent, nec unquam ad privatos pertinerent: dicens attentius illos militaturos, si etiam sua rura defenderent. Addidit sane his et animalia et servos, ut possent colere quod acceperant; ne per inopiam hominum vel per senectutem desererentur rura vicina barbariae, quod turpissimum ille ducebat.*" (Æl. Lamprid. in vita Alex. Severi).

tion of receiving military service from them and their heirs for ever.

Adopted by other countries.

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the princes of Europe; that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly *allodial*, (that is, wholly independent, and held of no superior at all) [5], now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feodal obligations of military fealty [m]. And thus, in the compass of a very few years, the feodal constitution, or the doctrine of tenure, extended itself over all the western world [6]. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feodal laws soon drove out the Roman, which had hitherto universally obtained, but now became for many centuries lost and forgotten; and Italy itself (as some of the civilians, with more spleen than judgment, have expressed it) *belluinas, atque ferinas, immanesque Longobardorum leges accepit* [n].

[m] Wright, 10.

[n] Gravin. Orig. l. 1, § 139.

(5) "Allodial lands are commonly opposed to beneficiary or feudal, the former being strictly proprietary, while the latter depended upon a superior. In this sense the word is of continual recurrence in ancient histories, laws, and instruments. It sometimes, however, bears the sense of *inheritance*, and this seems to be its meaning in the famous 62nd chapter of the Salic Laws, —De Alodis. 'Alodium interdum opponitur comparato', says Du Cange, 'in formulis veteribus.' Hence, in the charters of the eleventh century, hereditary fiefs are frequently termed alodia." (Hallam, Mid. Ages, vol. 1, p. 97).

(6) The feudal constitutions and usages were first reduced to writing about the year 1150, by two lawyers of Milan, under the title of *consuetudines feudorum*, and have been subjoined to Justinian's Novels in nearly all the editions of the body of the Roman law. Though this was the feudal law of the German empire, other states have modified this law by the spirit of their respective constitutions. —[CHITTY.]

The feodal polity made part of the constitution of England by William the Norman.

But this feodal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national constitution, till the reign of William the Norman [o]. Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what Sir William Temple calls the same northern hive, something similar to this was in use; yet not so extensively nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after, that feuds arrived to their full vigour and maturity, even on the continent of Europe [p] [7].

[o] Spelm. Gloss. 218. Bract. l. 2, c. 16, § 7.
[p] Crag. l. 1, t. 4.

(7) The received opinion is, that the feudal tenures existed among the Anglo-Saxons, though but partially, and in a less complete form than in France. Dalrymple traces their existence in the celebrated distinction between thain-land and reve-land. Land granted to the thains or lords was called thain-land; allodial, over which the king's officer or *reve*, afterwards called sheriff, had jurisdiction, was called *reve-land*. Again, land of the one kind being held by a charter, was at other times called *boc-land*, that is, book-land; land of the other kind, being held without writing and in the ancient manner, and mostly by the ancient inhabitants, was at other times called *folkland*. Unless, however, we resort, as Dalrymple has done, to the improbable supposition, that, contrary to the usual course of events, feudal land was sometimes converted into allodial, it would seem that the distinction was rather between land held of thains and land held of the Crown, and subject to the authority of his reves. Thus, it is a common return in Domesday Book, that "Hæc terra fuit tempore Edwardi *thain-land*, et postea conversum in *reve-land;* et idem dicunt legati regis quod ipsa terra et census qui inde exit, furtim aufertur regi." (Domesd. tit. *Hereford;* Dalrymple on Feuds, 14). Other writers consider that the folk-land was a precarious tenure, similar to that which is said to have been the origin of our copyholds. (See Hallam, Mid. Ages, vol. 2, p. 83).

A summary of the evidence on this question will be found in the second volume of Mr. Hallam's work, which has been so often cited. "Whether," says that antiquarian, in conclusion, "the law of feudal tenures can be said to have existed in England before the Conquest must be left to every reader's determination. Perhaps any attempt to decide it positively would end in a verbal dispute. In tracing the history of every political institution three things are to be considered—the principle, the form, and the name. The last will probably not be found in any genuine Anglo-Saxon record; of the form, or the peculiar ceremonies and incidents of a regular fief, there is some, though not much, appearance. But they who reflect upon the dependence in which free and even noble tenants held their

Adopted by the Norman barons, and afterwards assented to by the great council of the nation.

This introduction, however, of the feodal tenures into England by King William, does not seem to have been effected immediately after the conquest, nor by the mere arbitrary will and power of the Conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the Conqueror, and afterwards universally consented to by the great council of the nation long after his title was established. Indeed, from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions: which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seized on all the lands of England, and dealt them out again to his own favourites. A supposition, grounded upon a mistaken sense of the word *conquest;* which, in its feodal acceptation, signifies no more than *acquisition;* and this has led many hasty writers into a strange historical mistake, and one which upon the slightest examination will
[49] be found to be most untrue. However, certain it is, that the Normans now began to gain very large possessions in England; and their regard for the feodal law under which they had long lived, together with the king's recomendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon Chronicle [q], that in the nineteenth year of King William's reign an invasion was apprehended from Denmark; and the mili-

[q] *A. D.* 1085.

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estates of other subjects, and upon the privileges of territorial jurisdiction, will, I think, perceive much of the intrinsic character of the feudal relation, though in a less mature and systematic shape than it assumed after the Norman conquest." (Vol. 2, p. 88).

tary constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenceless; which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting them in a posture of defence. For, as soon as the danger was over, the king held a great council to inquire into the state of the nation[r]; the immediate consequence of which was the compiling of the great survey called domesday-book[8], which was finished in the next year: and in the latter end of that very year the king was attended by all his nobility at Sarum; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vasals, and did homage and fealty to his person[s]. This may possibly have been the æra of formally introducing the feodal tenures by law; and perhaps the very law, thus made at the council of Sarum, is that which is still extant[t], and couched in these [50] remarkable words: "*Statuimus, ut omnes liberi homines fœdere et sacramento affirment, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.*" The terms of this law (as Sir Martin Wright has ob-

[r] *Rex tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hâc terrâ; quo modo incoleretur, et a quibus hominibus.* Chron. Sax. ibid.

[s] *Omnes praedia tenentes, quotquot essent notae melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere, ejusque facti sunt vasalli, ac ei fidelitatis juramenta praestiterunt, se contra alios quoscunque illi fidos futuros.* Chron. Sax. A. D. 1086.

[t] Cap. 52. Wilk. 228.

(8) See Sir H. Ellis's preface to Domesday Book, and the First Report of the House of Commons on Public Records, Append. The inquiry was made upon oath before the King's justices appointed to conduct it. Domesday Book is the ultimate criterion for determining what lands are ancient demesnes of the Crown. It is also occasionally of importance in determining the parcels of manors, the pedigrees of families, the sites of ancient mills, the abbey lands belonging to religious houses, and a variety of other circumstances incident to the proof of immemorial rights and obligations. (Phillipps on Evidence, p. 579, 8th edition.)

served[u]) are plainly feodal: for, first, it requires the oath of fealty, which made in the sense of the feudists every man that took it a tenant or vasal: and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection[w], which exacts the performance of the military feodal services, as ordained by the general council. "*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet: et sint semper prompti et bene parati, ad servitium suum integrum nobis explendum et peragendum, cum opus fuerit; secundum quod nobis debent de foedis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti.*"

This new polity therefore seems not to have been *imposed* by the Conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all its allodial or free lands into the king's hands, who restored them to the owners as a *beneficium* or feud, to be held to them and such of their heirs as they previously nominated to the king: and thus by degrees all the allodial estates in France were converted into feuds, and the freemen became the vasals of the crown[x 9]. The only difference between this change of tenures in France, and that in England, was, that the former was effected gradually, by the consent of private persons; the latter was done at once, all over England, by the common consent of the nation[y].

Mode of its introduction into France.

[51]

[u] Tenures, 66.
[w] Cap. 58. Wilk. 228.
[x] Montesq. Sp. L. b. 31, c. 8.
[y] Pharaoh thus acquired the dominion of all the lands in Egypt, and granted them out to the Egyptians, reserving an annual render of the fifth part of their value. (Gen. c. xlvii).

(9) The passage cited from Montesquieu does not support this position. On the contrary, in almost all the southern provinces, or *pays du droit ecrit*, lands were presumed to be allodial, or *frank-aleux sans titre*, unless the contrary was shewn. (Hallam, Middle Ages, vol. 1, p. 114, n.) See *ante*, p. 45, n. (3), and Dictionnaire de Houard, voce *Aleu*.

In consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, "that the king is the universal lord and original proprietor of all the lands in his kingdom[z]: and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feodal services." For this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their new polity, though the fact was indeed far otherwise. And indeed, by thus consenting to the introduction of feodal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system; and to oblige themselves (in respect of their lands) to maintain the king's title and territories, with equal vigour and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feodal constitutions, and well understanding the import and extent of the feodal terms, gave a very different construction to this proceeding: and thereupon took a handle to introduce, not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations[a]; as if the English had, in fact as well as theory, owed every thing they had to the bounty of their sovereign lord.

From this system the maxim is derived that the king is proprietor of all the lands.

Our ancestors therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth[b]. However, this king, and his son William Rufus, kept up with a high hand all the rigours of the feodal doctrines: but their successor, Henry I., found it expedient, when he set up his pretensions to the crown, to

The system rigorously enforced by Will. I. and II.

[52]

Relaxed by Hen. I.

[z] *Tuit fuit in luy, et vient de luy al commencement.* (M. 24 Edw. III. 65).

[a] Spelm. of Feuds, c. 28.

[b] Wright, 81.

promise a restitution of the laws of King Edward the Confessor, or antient Saxon system; and accordingly, in the first year of his reign, granted a charter [c], whereby he gave up the greater grievances, but still reserved the fiction of feodal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till, in the reign of King John, they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him; which at length produced the famous great charter at Runingmead, which, with some alterations, was confirmed by his son Henry III. And, though its immunities (especially as altered on its last edition by his son) [d] are very greatly short of those granted by Henry I., it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the farther alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted: but this, properly considered, will shew, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that antient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms [10].

[c] LL. Hen. I. c. 1. [d] 9 Hen. III.

(10) "It has been very common," says Mr. Hallam, (History of the Middle Ages, vol. 1, p. 134), "to seek for the origin of feuds, or at least for analogies to them, in the histories of various countries. But though it is of great importance to trace the similarity of customs in different parts of the world, because it guides us to the discovery of general theorems as to human society, yet we should be on our guard against seeming analogies, which vanish away when they are closely observed. It is easy to find partial resemblances to the feudal system. The relation of patron and client in the Roman republic is not unlike that of lord and vassal in respect of mutual fidelity; but it was not founded on the tenure of land or on military service. The

Having given this short history of their rise and progress, we will next consider the nature, doctrine, and principal

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veteran soldier, and, in later times, some barbarian allies of the emperors, received lands upon condition of public defence; but they were bound not to an individual lord, but to the state. Such a resemblance to fiefs may be found in the Zemindaries of Hindostan and the Timariots of Turkey. The clans of the Highlanders and Irish followed their chieftain into the field; but their tie was that of imagined kindred and respect for birth, not the spontaneous compact of vassalage. Much less can we extend the name of feud, though it is sometimes strangely misapplied, to the polity of Poland and Russia. All the Polish nobles were equal in rights, and independent of each other. All who were less than noble were in servitude. No government can be more opposite to the long gradations and mutual duties of the feudal system. The regular machinery and systematic establishment of feuds, in fact, may be considered as almost confined to the dominions of Charlemagne, and to those countries which afterwards derived it from thence. In England, it can hardly be thought to have existed in a complete state before the conquest. Scotland, it is supposed, borrowed it soon after from her neighbour."

In another place Mr. Hallam has himself pointed out an institution, which appears to have been much more closely analogous to the proper feud than any of those enumerated above. "This was usually called *commendation;* and appears to have been founded on two very general principles, both of which the distracted state of society inculcated. The weak needed the protection of the powerful, and the government needed some security for public order. Even before the invasion of the Franks, Salvian, a writer of the fifth century, mentions the custom of obtaining the protection of the great by money, and blames their rapacity, though he allows the natural reasonableness of the practice. The disadvantageous condition of the less powerful freemen, which ended in the servitude of one part, and in the feudal vassalage of another, led such as fortunately still preserved their alodial property to insure its defence by a stipulated payment of money. Such payments, called Salvamenta, may be traced in extant charters, chiefly indeed of monasteries. In the case of private persons, it may be presumed, that this voluntary contract was frequently changed by the stronger party into a perfect feudal dependence. From this, however, I imagine it properly differed in being capable of dissolution at the inferior's pleasure, without incurring a forfeiture, as well as in having no relation to land. Homage, however, seems to have been incident to commendation as well as to vassalage. Military service was sometimes the condition of this engagement. It was the law of France, so late at least as the commencement of the third race of kings, that no man could take part in private wars, except in defence of his own lord; and this is strongly supported by the analogy of our own Anglo-Saxon laws, where it is frequently repeated, that no man should continue without a lord."

It is now generally admitted, that the feudal institutions owed their origin more to accidental circumstances operating through a long period of time, and less to the policy of the leaders of the northern hordes, than Blackstone seems inclined to admit. It was not the policy of the German invaders either entirely to drive out the old inhabitants of the lands they conquered, or entirely to abolish their laws and institutions. They shared the lands with the former possessors, and in some

vereign, and are therefore holden either mediately or immediately of the crown. The grantor was called the proprietor, or *lord;* being he who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use and possession according to the terms of the grant, was stiled the feudatory or *vasal,* which was only another name for the tenant or holder of the lands; though, on account of the prejudices which we have justly conceived against the doctrines that were afterwards granted on this system, we now use the word *vasal* opprobriously, as synonymous to slave or bondman [11]. The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi;* which are still the operative words in our modern infeodations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vasals; which perpetuated among them the æra of the new

Grant.

(11) A satisfactory derivation of this word has long been wanting, which is entirely omitted in Spelman's Glossary. Meyer suggests one which is at least plausible:—"The word '*gesell,*' he says, in Dutch and German, signifies companion. Tacitus, we know, has described the first rude appearances of the relation of lord and vassal, under the notion of companionship, but his terms *comites* and *comitatus* were necessarily abandoned for this purpose when they became applied, which was very early, to designate public officers and public charges, the governors of districts, and the districts themselves. But it is obvious that these must have been secondary meanings, that, before *comes* signified a count, or *comitatus* a county, they must have signified companion and companionhood, and we know that the first counts were what we should now call vassals of the monarch. When, however, the secondary meaning superseded the first, it seems not improbable that the original term might be *Latinised* into *guasallus* or *vasallus.*" (Esprit, Origine, et Progrès des Institutions Judiciaires, vol. 1, p. 144.

It is dangerous for a person whose knowledge is so superficial as mine to speculate in etymology, and this is not a place to speculate at length on such points, but I seem to see a general relation, confirming Meyer's theory, between *gesell* and *ghesind,* family—*gasindus,* a domestic servant—*guastaldus, gastaldus, guastaldo,* steward, or major-domo—*gastaldius,* whose office Spelman likens to that of our sheriff—or *vice-comes, alguazil,* and other words of the same family.—[COLERIDGE.]

The word *gesell,* in German, signifies an associate, or subordinate helper, as well as a companion; and *gesellschaft* is the ordinary name for an association or partnership. We sometimes use the word *associate* in the sense of a minister or assistant. The change of *g* into *v* or *w,* and *è converso,* is not uncommon; thus we have the barbarous word *vastum* in the old French *gast,* and again in our own language *waste;* so *guerir,* to fight for or defend; *garanter,* to *warrant;* and *garenne,* a preserve, *warren.*

acquisition, at a time when the art of writing was very little known: and therefore the evidence of property was reposed in the memory of the neighbourhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Oath of fealty and homage.

Besides an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance, the vasal or tenant upon investiture did usually *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sate before him; and there professing, that "he did become his *man*, from that day forth, of life and limb and earthly honour:" and then he received a kiss from his lord [e]. Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo* [f] [12].

[54]

Services of the vassal to the lord.

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service*, which, as such, he was bound to render, in recompense for the land that he held. This, in pure, proper, and original feuds, was only twofold; to follow, or do *suit* to, the lord in his courts in time of peace: and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vasals of the inferior lords were bound by their fealty to attend their domestic

[e] Litt. § 85.

[f] It was an observation of Dr. Arbuthnot, that tradition was no where preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope, vi. 134. 8vo.) It will not, I hope, be thought puerile to remark, in confirmation of this observation, that in one of our antient juvenile pastimes (the *king I am* or *basilinda* of Julius Pollux, Onomastic. l. 9, c. 7), the ceremonies and language of feodal homage are preserved with great exactness.

(12) *Homagium per paragium* was unaccompanied by any feudal obligation, and distinguished from *homagium legium*, which carried with it an obligation of fidelity. The Dukes of Normandy rendered only *homagium per paragium* to the Kings of France, and received the like from the Dukes of Brittany. In liege homage it was usual to make reservations of allegiance to the king or any other lord whom the homager had previously acknowledged. (Hallam, Middle Ages, volume 1, p. 119).

courts baron[5], (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants), in order, as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants: and upon this account, in all the feodal institutions, both here and on the continent, they are distinguished by the appellation of the peers of the court; *pares curtis*, or *pares curiæ*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence, and under the direction of his grand justiciary; till, in many countries, the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to
[55] themselves (in almost every feodal government) the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days as were stipulated at the first donation, in proportion to the quantity of the land [13].

[5] Feud. l. 2, t. 55.

(13) "Upon investiture the duties of the vassal commenced. These it is impossible to define or enumerate; because the services of military tenure, which is chiefly to be considered, were in their nature uncertain, and distinguished as such from those incident to feuds of an inferior description. It was a breach of faith to divulge the lord's counsel, to conceal from him the machinations of others, to injure his person or fortune, or to violate the sanctity of his roof, and the honour of his family. In battle he was bound to lend his horse to the lord when dismounted, to adhere to his side while fighting, and to go into captivity as a hostage for him when taken. His attendance was due to the lord's courts, sometimes to witness and sometimes to bear a part in the administration of justice. The measure, however, of military service was generally settled by some usage: forty days was the usual term during which the tenant of a knight's fee was bound to be in the field at his own expense. This was extended by St. Louis to sixty days, except when the charter of infeudation expressed a shorter period. But the length of service diminished with the quantity of land; for half-a-knight's fee, but twenty days were due; for an eighth part, but five; and when this was commuted for an escuage or pecuniary assessment, the same proportion was observed. Men turned of sixty, public magistrates, and of course women, were free from personal service, but obliged to send their substitutes: a failure in this primary duty incurred, perhaps, strictly a forfeiture of the fief; but it was usual for the lord to inflict an amercement, known in England by the name of escuage." (Hallam, vol. 1, p. 120).

At the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the *will* of the lord [h], who was then the sole judge, whether his vasal performed his services faithfully. Then they became certain for one or more *years*. Among the antient Germans they continued only from year to year; an annual distribution of lands being made by their leaders in their general councils or assemblies [i]. This was professedly done, lest their thoughts should be diverted from war to agriculture, lest the strong should encroach upon the possessions of the weak, and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and a peaceable possession of the new-acquired settlements had introduced new customs and manners; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory [k]. But still feuds were not yet *hereditary*, though frequently granted, by the favour of the lord, to the children of the former possessor; till in process of time it became unusual, and was therefore thought hard, to reject the heir, if he were capable to perform the services [l]: and therefore infants, women, and professed monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud: which was called a relief, because it raised up and re-established the inheritance; or, in the words of the feodal writers, "*incertam et caducam hereditatem relevabat.*" This relief

Feuds were first at the will of the lord,

then for years;

next for life;

[56]

then hereditary.

[h] Feud. l. 1, t. 1.

[i] Thus Tacitus: (de Mor. Germ. c. 26), "*Agri ab universis per vices occupantur: arva per annos mutant.*" And Cæsar yet more fully: (de Bell. Gal. l. 6, c. 21.) "*Neque quisquam agri modum certum aut fines proprios habet; sed magistratus ac principes, in annos singulos, gentibus et cognationibus hominum qui una coierunt, quantum eis et quo loco visum est, agri attribuunt, atque anno post alio transire cogunt.*"

[k] Feud. l. 1, t. 1.

[l] Wright, 14.

was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased [14].

Mode of descent.

For, in process of time, feuds came by degrees to be universally extended beyond the life of the first vasal, to his *sons*, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions: and, as they died off, their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation [m]. But when such a feud was given to a man and his *heirs*, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feodal succession, that "none was capable of inheriting a feud, but such as was of the blood of, that is, lineally descended from, the first feudatory [n]." And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this being found, upon many accounts, inconvenient, (particularly, by dividing

[m] Wright, 17. [n] Ibid. 183.

(14) "This," says Mr. Hallam, "is a very specious account of the matter. But they who consider the antiquity to which hereditary benefices may be traced, and the unreserved expressions of those instruments by which they were created, as well as the undoubted fact that a large proportion of fiefs had been absolute allodial inheritances, never really granted by the superior, will, perhaps, be led rather to look for the origin of reliefs in that rapacity with which the powerful are ever ready to oppress the feeble. When a feudal tenant died, the lord, taking advantage of his own strength and the confusion of the family, would seize the estate into his hands, either by the right of force or under some litigious pretext. Against this violence the heir could in general have no resource but a compromise, and we know how readily acts of successful injustice change their name, and move demurely, like the wolf in the fable, under the clothing of law."

the services, and thereby weakening the strength of the feodal union), and *honorary* feuds (or titles of nobility) being now introduced, which were not of a divisible nature, but could only be inherited by the eldest son [o]; in imitation of these, *military* feuds (or those we are now describing) began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest [p] [15].

[57]

Other qualities of feuds were, that the feudatory could not aliene or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord [q]. For, the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself or from his posterity, who were presumed to inherit his valour, to others who might prove less able. And, as the feodal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection in return for his own fealty and service; therefore

Vassal could not aliene his feud,

nor the lord his seigniory, without consent.

[o] Feud. 2, t. 55. [p] Wright, 32. [q] Ibid. 29.

(15) "A custom, very similar in effect to subinfeudation, was the tenure by *frérage*, which prevailed in many parts of France. Primogeniture, in that extreme which our common law has established, was unknown, I believe, in every country on the continent. The customs of France found means to preserve the dignity of families, and the indivisibility of a feudal homage, without exposing the younger sons of a gentleman to absolute beggary or dependence. Baronies, indeed, were not divided; but the eldest son was bound to make a provision in money, by way of appanage, for the other children, in proportion to his circumstances and their birth. As to inferior fiefs, in many places, an equal partition was made; in others, the eldest took the chief portion, generally two-thirds, and received the homage of his brothers for the remaining part, which they divided. To the lord of whom the fief was held, himself did homage for the whole. In the early times of the feudal policy, when military service was the great object of the relation between lord and vassal, this, like all other subinfeudations, was rather advantageous to the former; for when the homage of a fief was divided, the service was diminished in proportion. Suppose, for example, the obligation of military attendance for an entire manor to have been forty days, if that came to be split equally between two, each would owe but a service of twenty. But if, instead of being homagers to the same *suzerain*, one tenant held immediately of the other, as every feudatory might summon the aid of his own vassals, the superior lord would in fact obtain the service of both. Whatever opposition, therefore, was made to the rights of subinfeudation or frérage, would indicate a decay in the military character, the living principle of feudal tenure." (Hallam, Middle Ages, vol. 1, p. 126).

the lord could no more transfer his seignory or protection without consent of his vasal, than the vasal could his feud without consent of his lord[r]: it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vasal should owe subjection to a superior not of his own choosing.

Feuds afterwards let to rent, and bought and sold.

These were the principal, and very simple, qualities of the genuine or original feuds; which were all of a military nature, and in the hands of military persons; though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction: which returns, or *reditus*, were the original of rents, and by these means the feodal polity was greatly extended; these inferior feudatories (who held what are called in the Scots law "rere-fiefs") being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords[s]. But this at the same time demolished the antient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken: and under that of improper or derivative feuds were comprised all such as do not fall within the other description; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual license; and such as might descend indifferently either to

Reditus, or rent.

[58]

[r] Wright, 30. [s] Ibid. 20.

males or females. But, where a difference was not expressed in the creation, such new-created feuds did in all respects follow the nature of an original, genuine, and proper feud [t].

The system varied in different countries.

But, as soon as the feodal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject: in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised: what effect it has produced on the landed property of England will appear in the following chapters [16].

[t] Feud. 2, t. 7.

(16) Upon the subject of this and the following chapters, the student is recommended to study the excellent "Essay on Feudal Property" by Sir John Dalrymple, an author who, notwithstanding some errors on antiquarian points of little importance, cannot be too highly praised for the philosophical accuracy and elegance with which he has treated a subject that most writers contrive to render extremely obscure and repulsive.

CHAPTER V.

OF THE ANTIENT ENGLISH TENURES.

View of ancient tenures.

In this chapter we shall take a short view of the antient tenures of our English estates, or the manner in which lands, tenements, and hereditaments, might have been holden, as the same stood in force, till the middle of the last century. In which we shall easily perceive, that all the particularities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon feodal principles, and no other; being fruits of, and deduced from, the feodal policy.

Explanation of the words tenure, &c.

Almost all the real property of this kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and *holden* of, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore stiled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is stiled the lord *paramount*, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king [1]; and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A., and he granted a portion of the land

King called lord paramount.

Mesne lords.

(1) William the First and other feudal sovereigns, though they made large and numerous grants of lands, always reserved a rent, or certain annual payments (commonly very trifling), which were collected by the sheriffs of the counties in which the lands lay, to shew that they still retained the *dominium directum* in themselves. (Madox, History of the Exchequer, c. 10; Craig de Feudis, l. 1, c. 9.—[CHITTY.]

to B., now B. was said to hold of A., and A. of the king; or, in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was stiled lord paramount; A. was both tenant and lord, or was a mesne lord: and B. was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail or profit of the land[a]. In this manner are all the lands of the kingdom holden, which are in the hands of subjects: for, according to Sir Edward Coke[b], in the law of England we have not properly *allodium*; which, we have seen[c], is the name by which the feudists abroad distinguish such estates of the subject, as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feodal nature.

Tenant paravail.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief[2]; which was the most honourable species of tenure, but at the same time subjected the tenants to greater and more burthensome services, than inferior tenures did[d]. This distinction ran through all the different sorts of tenure, of which I now proceed to give an account.

Tenants in capite.

I. There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services; in respect of their

Four species of lay tenures.

[a] 2 Inst. 296.

[b] 1 Inst. 1.

[c] Page 47.

[d] In the Germanic constitution, the electors, the bishops, the secular princes, the imperial cities, &c., which hold directly from the emperor, are called the *immediate* states of the empire; all other landholders being denominated *mediate* ones. (Mod. Un. Hist. xliii. 61).

(2) A distinction was taken between tenure *in capite* ut de coronâ, which meant a tenure of the king of lands which were always held directly from the crown, and tenure *ut de honore*, where the land, having originally been held of a subject, came to be held of the crown, by reason of some escheat or forfeiture of the mesne seignory, whether an honor, manor, or castle. Tenure *in capite*, standing unexplained, was generally understood to be tenure ut de coronâ. (See Harg. Co. Litt. 108. a.)

quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier or a freeman to perform; as, to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were fit only for peasants or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain* depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villein service.

Free services.

[61]

Base services.

Certain services.

Uncertain services.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England, till the middle of the last century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the Third) seems to give the clearest and most compendious account, of any author antient or modern[e]; of which the following is the outline or abstract[f]. "Tenements are of two kinds, *frank-tenement* and *villenage*. And, of frank-tenements, some are held freely in consideration of homage and *knight-service*; others in *free-socage*, with the service of fealty only." And again[g], "of villenages some are pure, and others privileged. He that holds in *pure villenage* shall do whatsoever is commanded him, and always be bound to an uncertain service. The other kind of villenage is called *villein-socage*; and these villein-socmen do villein services, but such as are certain and determined." Of which the sense seems to be as follows: first, where the service was *free* but *uncertain*, as military service with homage, that tenure was called the tenure in chivalry, *per servitium militare*, or by knight-service. Secondly, where the service was not

Their names and the different services incident to each.

[62]

[e] l. 4, tr. 1, c. 28.

[f] *Tenementorum aliud liberum, aliud villenagium. Item, liberorum aliud tenetur libere pro homagio et servitio militari; aliud in libero socagio cum fidelitate tantum.* § 1.

[g] *Villenagiorum aliud purum, aliud privilegiatum. Qui tenet in puro villenagio faciet quicquid ei praeceptum fuerit, et semper tenebitur ad incerta. Aliud genus villenagii dicitur villanum socagium; et hujusmodi villani socmanni—villana faciunt servitia, sed certa et determinata.* § 5.

only *free*, but also *certain*, as by fealty only, by rent and fealty, &c., that tenure was called *liberum socagium*, or free socage. These were the only *free* holdings or tenements; the others were *villenous* or servile: as thirdly, where the service was *base* in its nature, and *uncertain* as to time and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was *base* in its nature, but reduced to a *certainty*, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called socage (from the *certainty* of its services), but degraded by their *baseness* into the inferior title of *villanum socagium*, villein-socage [3].

I. The first, most universal, and esteemed the most honourable species of tenure, was that by knight-service [4], called in Latin *servitium militare*; and in law-French *chivalry*, or *service de chivaler*, answering to the *fief d'haubert* of the Normans [h], which name is expressly given it by the Mirrour [i 5]. This differed in very few points, as we shall I. Knight-service.

[h] Spelm. Gloss. 219. [i] C. 2, § 27.

(3) The passage on villenage in Bracton is not accurately cited, but, so far as regards pure villenage, the sense is fairly enough given: as to the other branch the passage stands thus in the original:—"Est etiam aliud genus villenagii *quod tenetur de domino rege à conquestu Angliæ*, quod dicitur Socagium villanum, et quod est villenagium, sed tamen privilegiatum. Habent itaque *tenentes de dominicis Domini Regis* tale privilegium, quod à glebâ amoveri non debent, quamdiu velint et possint facere debitum servitium; et hujusmodi villani sokmanni propriè dicuntur glebæ ascripticii. Villana autem faciunt servitia, sed certa et determinata." All villein socmen, therefore, were originally tenants in antient demesne. (See post, p. 98).—[COLERIDGE.]

(4) *Knight-service*, having regard to etymology, is a tautologous expression. Among the Anglo-Saxons the vassals of the king were called *Thegns* or *Thanes*, that is to say *servants*, from *Thegnian* (in modern German *Dienen*) to serve; and they rendered *Thanes* by the Latin word *ministri*. So, the knight (Anglo-Saxon *cnicht*) was the *knecht* or servant of his superior; and among the Germans the word still has this meaning only; their equivalent for our modern *knight* being *ritter*.

(5) Sir W. Wright cites from Loyseau, Traité des Seigneuries, 156, 157, the following rational explanation of the fief d'haubert:—"Les seigneurs des baronnies se sont appelez Hauts Barons, ou Hauts Bers, car il est bien certain que ber et baron est mesme chose. Et Haut Ber et Haut Baron sont confondus comme synonimes, et de là sans doute originairement a estre dit le fief de Hautbert. Mais pour ce que le Haut Ber ou seigneur de fief de hautbert estoit tenu servir le roy en guerre avec

presently see, from a pure and proper feud, being entirely military, and the genuine effect of the feodal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare;* the measure of which in 3 Edw. I. was estimated at twelve plough-lands[k], and its value (though it varied with the times[l]) in the reigns of Edward I. and Edward II.[m] was stated at 20*l. per annum*[6]. And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon[n]: which attendance was his *reditus* or return, his rent or service, for the land he claimed to hold. If he held only half a knight's
[63] fee, he was only bound to attend twenty days, and so in proportion[o]. And there is reason to apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feodal system.

This tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi*[p]; was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; viz. aids, relief, primer

Seven incidents to knight-service.

[k] Pasch. 3 Edw. I. Co. Litt. 69.
[l] 2 Inst. 596.
[m] Stat. Westm. 1, c. 36. Stat. de Milit. 1 Edw. 2. Co. Litt. 69.
[n] See writs for this purpose in Memorand. Scacch. 36, prefixed to Maynard's Year-book, Edw. II.
[o] Litt. § 95.
[p] Co. Litt. 9.

armes pleins, et consequemment avec l'arme du corps, qui estoit lors la cotte de mailles, de là est venu que cest arme a esté apellez Hauber, ou Haubergeon, dont à succession de temps est advenu que le fief de hauber a esté pris pour toute espèce de fief, dont le seigneur est tenu servir le roy avec le hauber ou haubergeon." (Wright, 143.)—[COLERIDGE.]

(6) Mr. Selden contends, that a knight's fee did not consist of land of a fixed extent or value, but was as much as the king was pleased to grant, upon the condition of having the service of one knight. (Tit. of Hon. p. 2, c. 5, ss. 17 and 26). This is more probable; besides, it cannot be supposed, that the same quantity of land was every where of the same value.—[CHRISTIAN.]

seisin, wardship, marriage, fines for alienation, and escheat: all which I shall endeavour to explain, and shew to be of feodal original[7].

1. Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress[q]; but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three: first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feodal attachment and fidelity: insomuch that the neglect of doing it, whenever it was in the vasal's power, was by the strict rigour of the feodal law an absolute forfeiture of his estate[r]. Secondly, to make the lord's eldest son a knight; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms[s]: the intention of it being to breed up the eldest son and heir apparent of the seignory to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughters' portions were in those days extremely slender; few lords being able to save much out of their income for this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this or any other incumbrances[8]. From bearing their proportion to these aids no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, 1. Aids. [64]

[q] *Auxilia fiunt de gratiâ, et non de jure,—cum dependeant ex gratiâ tenentium, et non ad voluntatem dominorum.* Bracton, l. 2, tr. 1, c. 16, § 8.

[r] Feud. l. 2, t. 24.

[s] 2 Inst. 233.

(7) Sir John Dalrymple, in his Essay on Feudal Property, p. 24, says, that "in England, before the 12th of Car. 2, if the king had granted lands without reserving any particular services or tenure, the law, creating a tenure for him, would have made the grantee hold by knight's service."

Wright also says, that "military tenure was created by pure words of donation." (Wright's Ten. 141).—[CHRISTIAN.]

(8) By the Statute West. 1, c. 36, the aid for the marriage portion of the lord's eldest daughter could not be demanded till she was seven years of age, and if he died, leaving her unmarried, she might recover the amount so received by him from his executors.

contributed to the knighting of their founder's male heir (of whom their lands were holden) and the marriage of his female descendants [t]. And one cannot but observe in this particular the great resemblance which the lord and vasal of the feodal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defence and protection. For, with regard to the matter of aids, there were three which were usually raised by the client; viz. to marry the patron's daughter; to pay his debts; and to redeem his person from captivity [u].

Amount of aids.

But besides these antient feodal aids, the tyranny of lords by degress exacted more and more; as, aids to pay the lord's debts, (probably in imitation of the Romans), and aids to enable him to pay aids or reliefs to his superior lord; from which last indeed the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king, who had no superior. To prevent this abuse, King John's *magna carta* [v] ordained that no aids be taken by the king without consent of parliament, nor in anywise by inferior lords, save only the three antient ones above mentioned. But this provision was omitted in Henry III.'s charter, and the same oppressions were continued till the 25 Edw. I., when the statute called *confirmatio chartarum* was enacted; which in this respect revived King John's charter, by ordaining that none but the antient aids should be taken. But though the species of aids was thus re-
[65] strained, yet the quantity of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable [w]; and that the aids taken by the king of his tenants *in capite* should be settled by parliament [x]. But they were never completely ascertained and adjusted till the statute Westm. 1, 3 Edw. I. c. 36, which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of the annual value of every knight's fee, for making the eldest son

[t] Philips's Life of Pole, I. 223.

[u] *Erat autem haec inter utrosque officiorum vicissitudo—ut clientes ad collocandas senatorum filias de suo conferrent; in aeris alieni dissolutionem gratuitam pecuniam erogarent; et ab hostibus in bello captos redimerent.* Paul. Manutius de senatu Romano, c. 1.

[v] Cap. 12, 15.

[w] Cap. 15.

[x] Id. 14.

a knight, or marrying the eldest daughter: and the same was done with regard to the king's tenants *in capite*, by stat. 25 Edw. III. c. 11. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.

2. Relief, *relevium*, was before mentioned as incident to every feodal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. But though reliefs had their original while feuds were only life-estates [8], yet they continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first, they were merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir [y]. The English ill brooked this consequence of their new-adopted policy; and therefore William the Conqueror by his laws [z] *ascertained* the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms, and habiliments of war, should be paid by the earls, barons, and vavasours respectively; and if the latter had no arms, they should pay 100*s*. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feodal laws: thereby in effect obliging every heir to new-purchase or *redeem* his land [a]: but his brother Henry I., by the charter before mentioned, restored his father's law; and ordained, that the relief to be paid should be according to the law so established, and not an arbitrary redemption [b]. But afterwards, when, by an ordinance in 27 Hen. II., called the assize of arms, it was provided that every man's armour should descend to his heir, for defence of the realm; and it thereby became impracticable to pay these acknowledgments in arms according to the laws of the conqueror, the composition was universally accepted of 100*s*. for every knight's fee; as we find

2. Reliefs.

Amount of relief.

[66]

[y] Wright, 99.
[z] C. 22, 23, 24.
[a] 2 Roll. Abr. 514.
[b] "*Haeres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevatione relevabit eam.*" (Text. Roffens. cap. 34).

(8) But see ante, p. 56, note (14).

it ever after established[c]. But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one and twenty years[9].

3. Primer seisin.

3. *Primer seisin* was a feodal burthen, only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords[10]. It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession: and half a year's profits, if the lands were in reversion expectant on an estate for life[d]. This seems to be little more than an additional relief, but grounded upon this feodal reason; that, by the antient law of feuds, immediately upon a death of a vasal the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture: during which interval the lord was entitled to take the profits; and, unless the heir claimed within a year and day, it was by the strict law a forfeiture[e]. This practice however seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but, as to the king's tenures *in capite*, the *prima seisina* was expressly declared, under Henry III. and Edward II., to belong to the king by prerogative, in contradistinction to other lords[f]. The king

[67]

was entitled to enter and receive the whole profits of the land, till livery was sued; which suit being commonly made within a year and day next after the death of the tenant, in pursuance of the strict feodal rule, therefore the king used to take as an average the *first fruits*, that is to say, one year's profits of the land[g]. And this afterwards gave a handle to the popes, who claimed to be feodal lords of the church, to claim in like manner from every clergyman in

[c] Glanv. l. 9, c. 4. Litt. § 112.
[d] Co. Litt. 77.
[e] Feud. l. 2, t. 24.
[f] Stat. Marlb. c. 16. 17 Edw. II. c. 3.
[g] Staundf. Prerog. 12.

(9) As to socage relief, see Harg. Co. Litt. 93. a.

(10) The tenure *in capite* here spoken of is tenure *ut de coronâ*: there was no primer seisin of the lands of a tenant in capite *ut de honore*. (Co. Litt. 77. a.; ante, p. 60, n. (2)).

England the first year's profits of his benefice, by way of *primitiae*, or first fruits.

4. These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female[h], the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry[11]. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one: but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen; yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1, 3 Edw. I. c. 22, the two additional years being given by the legislature for no other reason but merely to benefit the lord[i 12]. 4. Wardship.

This wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were arbitrary, temporary, or for life only; yet when they became hereditary, and did consequently often descend upon

[h] Litt. § 103. [i] Ibid.

(11) This incident of wardship did not obtain except in Normandy and England, and, perhaps, in some parts of Germany. By the law of France, the custody of the land was entrusted to the next heir, and that of the person, as in socage tenures among us, to the nearest kindred of that blood which could not inherit. By a gross abuse of this custom in England, the right of guardianship in chivalry, or temporary possession of the lands, was assigned over to strangers. This was one of the most vexatious parts of our feudal tenures, and was never, perhaps, more sorely felt than in their last stage under the Tudor and Stuart families. (Hallam, vol. 1, p. 128).

(12) The text is somewhat at variance with the authority of Lord Coke, who says, "*Cessante causâ cessat effectus;* and therefore, if within the two years the lord marrieth the heir-female, the heir-female shall presently enter, because for that cause the two years are given. If the guardian marry the heir-female after the age of twelve years, he shall not detain her land but until her age of fourteen, for the cause ceaseth. So it is if the ancestor marrieth his heir-female and dieth before she attain to her age of fourteen, the land shall be in ward, but the lord shall not have the the two years." (2 Inst. 203, 4).—[CHITTY.]

infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feodal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might, out of the profits thereof, provide a fit
[68] person to supply the infant's services, till he should be of age to perform them himself[13]. And if we consider the feud in its original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I. before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy: and also, in a political view, the lord was most concerned to give his tenant a suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

When the male heir arrived to the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or *ousterlemain*[k]; that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to *magna carta*[l].

[k] Co. Litt. 77. [l] 9 Hen. III. c. 3.

(13) If an infant tenant by knight's service was created a knight, the king was no longer entitled to the wardship of his person, nor to the value of his marriage. (*Sir John Radcliff's case*, Plow. 267). And the reason there assigned is, that "when he is made a knight by the king, who is the chief captain of all chivalry, or by some other great captain assigned by the king for that purpose, he is thereby allowed and admitted to be able to perform knight's service; and then his body ought not to be in ward, because his imbecility ceases, and *cessante causâ, cessabit effectus.*"—[CHRISTIAN.]

However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins [m]. In order to ascertain the profits that arose to the crown by these fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county [n], commonly called an *inquisitio post mortem;* which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was holden, and who, and of what age his heir was: thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII., that, by colour of false inquisitions, they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto [o]. And afterwards, a court of wards and liveries was erected [p] for conducting the same inquiries in a more solemn and legal manner [14].

Inquisitiones post mortem.

[69]

Court of wards and liveries.

When the heir thus came of full age, provided he held a knight's fee *in capite* under the crown, he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For, in those heroical times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who, in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance; which ceremony, as was formerly hinted [q], is supposed to have been the original of the feodal knighthood [r].

Knighthood

[m] Co. Litt. 77.
[n] Hoveden, sub. Ric. I.
[o] 4 Inst. 198.
[p] Stat. 32 Hen. VIII. c. 46.
[q] Vol. 1, p. 404.
[r] "*In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto frameâque juvenem ornant. Haec apud illos toga, hic primus juventae honos: ante hoc domûs pars videntur; mox reipublicae.*" De Mor. Germ. cap. 13.

(14) The Court of Wards was created by the stat. 32 Hen. 8, c. 46, and in the following year the jurisdiction of liveries was added. (33 Hen. 8, c. 22.)

This prerogative, of compelling the king's vasals[15] to be knighted, or to pay a fine, was expressly recognized in parliament by the statute *de militibus*, 1 Edw. II.[16]; was exerted as an expedient for raising money by many of our best princes, particularly by Edward VI. and Queen Elizabeth; but yet was the occasion of heavy murmurs when exerted by Charles I.: among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal
[70] exertion, of prerogative. However, among the other concessions made by that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of the crown, and it was accordingly abolished by statute 16 Car. I. c. 20.

5. Lords' rights in marriage of wards.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of *marriage (maritagium*, as contradistinguished from *matrimonium)*, which in its feodal sense signifies the power, which the lord or guardian in chivalry had, of disposing of his infant ward in matrimony[17]. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement* or inequality: which if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian[s]; that is, so much as a jury would assess, or any one would *bonâ fide* give to the guardian for such an alliance[t]: and, if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii*[u] [18]. This seems to have been one

[s] Litt. § 110. [t] Stat. Mert. c. 6. Co. Litt. 82. [u] Litt. § 110.

(15) I do not find that this prerogative was confined to the king's tenants: Lord Coke does not make that distinction in his commentary on the stat. *de milit.* (2 Inst. 593). Nor is the power of the commissioners limited to the king's tenants in the commissions issued by Edw. 6, and Queen Elizabeth; which see in 15 Rym. Foed. 124 and 493. See 16 Car. 1, c. 20; 2 Rushw. 70; and vol. 1, p. 404.—[CHRISTIAN.]

(16) This so-called statute appears to have been a mere writ entered on the roll. (2nd Inst. 593).

(17) This custom seems to have been of the same extent as that of wardship, and existed in scarcely any other place than in Normandy and England. (See Hallam, Hist. of the Middle Ages, vol. 1, p. 129).

(18) That is, after a suitable match had been tendered by the lord. In the case of a tender and refusal, and no

of the greatest hardships of our antient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *control* of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy[w]: but no tolerable pretence could be assigned why the lord should have the *sale* or *value* of the marriage. Nor indeed is this claim of strictly feodal original; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards[x]; which was introduced into England, together with the rest of the Norman doctrine of feuds: and it is likely that the lords usually took money for such their consent, since, in the often-cited charter of Henry the First, he engages for the future to take nothing for *his* consent; which also he promises in general to give, provided such female ward were not married to his enemy. [71] But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by King John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract[y]; or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate suâ*[z]. But these provisions in behalf of the relations were omitted in the charter of Henry III.: wherein[a] the clause stands merely thus, *"hæredes maritentur absque disparagatione:"* meaning certainly, by *hæredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage[b] of heirs male; and as Glanvil[c] expressly confines it to heirs female. But the king and his great lords thenceforward took a handle (from the

[w] Bract. l. 2, c. 37, § 6.
[x] Gr. Cust. 95.
[y] Cap. 6, edit. Oxon.
[z] Cap. 3, ibid.
[a] Cap. 6.
[b] The words *maritare* and *maritagium* seem *ex vi termini* to denote the providing of an *husband*.
[c] l. 7, cc. 9 and 12, and l. 7, c. 4.

marriage elsewhere, the lord had the single value. Female heirs were not subject to the *duplex valor maritagii*. (Co. Litt. 82. b. See also 5 Rep. 126; 6 Rep. 70; 2 Inst. 90, 92, 202, 204).—[CHITTY.]

ambiguity of this expression) to claim them both, *sive sit masculus sive fœmina*, as Bracton more than once expresses it[d]: and also, as nothing but disparagement was restrained by *magna carta*, they thought themselves at liberty to make all other advantages that they could[e]. And afterwards this right of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the statute of Merton[f]; which is the first direct mention of it that I have met with, in our own or any other law [19].

6 Fines for alienation.

6. Another attendant or consequence of tenure by knight-service was that of *fines* due to the lord for every *alienation*, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feodal connexion; it not being reasonable nor allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his

[d] l. 2, c. 38, § 1. [e] Wright, 97. [f] 20 Hen. III. c. 6.

(19) What fruitful sources of revenue these wardships and marriages of the tenants, who held lands by knight's service, were to the crown, will appear from the two following instances collected among others by Lord Lyttleton, Hist. Hen. II. 2 vol. 296. "John Earl of Lincoln gave Henry the Third 3000 marks to have the marriage of Richard de Clare, for the benefit of Matilda, his eldest daughter; and Simon de Montford gave the same king 10,000 marks to have the custody of the lands and heir of Gilbert de Unfranville, with the heir's marriage, a sum equivalent to a hundred thousand pounds at present." In this case the estate must have been large, the minor young, and the alliance honourable. For, as Mr. Hargrave informs us, who has well described this species of guardianship, "the guardian in chivalry was not accountable for the profits made of the infant's lands, during the wardship, but received them for his own private emolument, subject only to the bare maintenance of the infant. And this guardianship, being deemed more an interest for the profit of the guardian, than a trust for the benefit of the ward, was saleable and transferable, like the ordinary subjects of property, to the best bidder; and if not disposed of, was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might devolve upon the most perfect stranger to the infant; one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence." (Co. Litt. 88, n. 11). One cannot read this without astonishment, that such should continue to be the condition of the country till the year 1660, which, from the extermination of these feudal oppressions, ought to be regarded as a memorable æra in the history of our law and liberty.—[CHRISTIAN.]

own stead, without the consent of the lord: and, as the feodal obligation was considered as reciprocal, the lord also could not alienate his seignory without the consent of his tenant, which consent of his was called an *attornment*. This restraint upon the lords soon wore away; that upon the tenants continued longer. For, when every thing came in process of time to be bought and sold, the lords would not grant a licence to their tenant, to aliene, without a fine being paid; apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowledgment on his admission to a newly-purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants *in capite*, who were never able to aliene without a licence: but as to common persons, they were at liberty, by *magna carta* [g] [20], and the statute of *quia emptores* [h], (if not earlier), to aliene the whole of their estate, to be holden of the same lord as they themselves held it of before. But the king's tenants *in capite*, not being included under the general words of these statutes, could not aliene without a licence: for if they did, it was in antient strictness an absolute forfeiture of the land [i]; though some have imagined otherwise. But this severity was mitigated by the statute 1 Edw. III. c. 12, which ordained, that, in such case, the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one third of the yearly value should be paid for a licence of alienation; but if the tenant presumed to aliene without a licence, a full year's value should be paid [k].

[72]

Attornment.

7. The last consequence of tenure in chivalry was *escheat* [21]; which is the determination of the tenure, or

7. Escheat.

[g] Cap. 32.
[h] 18 Edw. I. c. 1.
[i] 2 Inst. 66.
[k] Ibid. 67.

(20) The construction of Magna Charta, from which this consequence is deduced, is not very obvious, and has not been always approved of. (See Sulliv. Lect. p. 385).

(21) Escheat, from *echoir*, to expire or run out, a word which also had the secondary meaning of, to happen, whence *échet*, an opportunity, a piece of luck. The effect of the statutes 54 Geo. 3, c. 145, and 3 & 4 Will. 4, c. 106, will be noticed in another place. (Infra, p. 244).

dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means; if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable
[73] quality was entirely blotted out and abolished. In such cases the land escheated or fell back to the lord of the fee[1]; that is, the tenure was determined by breach of the original condition expressed or implied in the feodal donation[22]. In the one case, there were no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, shewed that he was no longer to be trusted as a vasal, having forgotten his duty as a subject; and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it[m].

Summary of incidents of tenure by knight-service.

These were the principal qualities, fruits, and consequences of the tenure by knight-service: a tenure, by which the greatest part of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the last century; and which was created, as Sir Edward Coke expressly testifies[n], for a military purpose, viz. for defence of the realm by the king's own principal subjects, which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of knight-service proper; which was to attend the king in his wars. There were also some other species of knight-service; so called, though improperly, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and consequences. Such was the tenure by *grand serjeanty*, *per magnum servitium*, whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special

Tenure by grand serjeanty.

[1] Co. Litt. 13. [m] Feud. l. 2, t. 86. [n] 4 Inst. 192.

(22) Escheat on account of the treason or felony of the tenant himself was more usually called forfeiture.

honorary service to the king in person; as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronation [o] [23]. It was in most other respects like knight-service [p]; only he was not bound to pay aid [q], or escuage [r]; and, when tenant by knight-service paid five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little [s]. Tenure by *cornage*, which was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand serjeanty [t] [24]. [74]

By cornage.

These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But, the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti: scutum* being then a well-known denomination for money: and in like manner, it was called, in our Norman French, *escuage;* being indeed a pecuniary, instead of a military, service [25].

Escuage.

[o] Litt. § 153.
[p] Ibid. § 158.
[q] 2 Inst. 233.
[r] Litt. § 158.
[s] Ibid. § 154.
[t] Ibid. § 156.

(23) In Italy, it seems, and probably in other countries where the feudal system prevailed, the most ordinary mechanical employments in the houses of the great were made the services and conditions of holding lands. (Muratori, Diss. ii.)

(24) A bill was brought in Chancery, suggesting that an antique horn, with an old inscription, had immemorially gone with the plaintiff's estate, and was delivered to his ancestors to hold their lands by, and praying that it might be restored. The Lord Keeper was of opinion, that, if the land was of the tenure of cornage, the heir was entitled to this monument of antiquity at law. (1 Vern. 273; 1 Inst. 107. a). —[CHITTY.]

(25) But Littleton, Coke, and Bracton render it the service of the shield, i. e. of arms, being a compensation for actual service. (Co. Litt. 68. b.; see Harg. Co. Litt. 73. a., 74. a.)

Sir M. Wright considers that escuage, though in some instances the compensation made to the lord for the omission of actual service, was also in many others a pecuniary aid or tribute originally reserved by particular lords in-

The first time this appears to have been taken was in the 5 Hen. II., on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our antient histories, that, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops; and these assessments, in the time of Hen. II., seem to have been made arbitrarily and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and King John was obliged to consent by his *magna carta*, that no scutage should be imposed without consent of parliament [u]. But this clause was omitted in his son Henry III.'s charter,
[75] where we only find [w] that scutages or escuage should be taken as they were used to be taken in the time of Henry II.: that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. I. c. 5 & 6, and many subsequent statutes [x], it was again provided, that the king should take no aids or tasks but by the common assent of the realm: hence it was held in our old books, that escuage or scutage could not be levied but by consent of parliament [y]; such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times.

Since, therefore, escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton [z] must be understood, when he tells us, that tenant by homage, fealty, and escuage, was tenant by knight-service: that is, that this tenure (being subservient to the military policy of the nation) was respected [a] as a tenure in chivalry [b]. But as the actual service was uncertain, and

[u] *Nullum scutagium ponatur in regno nostro, nisi per commune consiliam regni nostri.* Cap. 12.
[w] Cap. 37.
[x] See vol. 1, p. 140.
[y] Old Ten. tit. *Escuage.*
[z] § 103.
[a] Wright, 122.
[b] *Pro feodo militari reputatur.* Flet. l. 2, c. 14, § 7.

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stead of personal service, varying in amount according to the expenditure which the lord had to incur in his personal attendance upon the king in his wars. This explains the distinction between knight-service and escuage in the old authors. (See Wright, 121, 134; Litt. s. 98, 120).—[CHITTY.]

depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent; and the tenure, instead of knight-service, would have then been of another kind, called socage [c], of which we shall speak in the next chapter.

Corruption of military tenures by escuage.

For the present I have only to observe, that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feodal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of tenures now tended to nothing else but a wretched means of raising money to pay an army of occasional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burthens, which (in consequence of the fiction adopted after the conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which however were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seisin*; and, if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith [d] very feelingly complains, "when he came to his own, after he was out of *wardship*, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren," to reduce him still farther, he was yet to pay half a year's profits as a fine for suing out his *livery*; and also the price or value of his *marriage*, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value

[76]

Corruption and hardships of military tenure.

[c] Litt. § 97, 120.

[d] Commonw. l. 3, c. 5.

if he married another woman. Add to this, the untimely and expensive honour of *knighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *licence* of *alienation*.

A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom.

Palliatives applied.

Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of King James I. consented[e], in consideration of a proper equivalent, to abolish them all;

[77]

though the plan proceeded not to effect; in like manner as he had formed a scheme, and began to put it in execution, for removing the feodal grievance of heritable jurisdictions in Scotland[f], which has since been pursued and effected by the statute 20 Geo. II. c. 43[g]. King James's plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued; only with this difference, that, by way of compensation for the loss which the crown and other lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the crown and assured to the inferior lords, payable out of every knight's fee within their respective seignories. An expedient seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages, (having during the usurpation been discontinued), were destroyed at one blow by the statute 12 Car. II. c. 24, which enacts, "that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king or others, be totally taken away[26]. And that all fines for alienations,

Military tenures destroyed.

[e] 4 Inst. 202.

[f] Dalrymp. of Feuds, 292.

[g] By another statute of the same year (20 Geo. II. c. 50), the tenure of *wardholding* (equivalent to the knight-service of England) is for ever abolished in Scotland.

(26) Both Mr. Madox and Mr. Hargrave have taken notice of this inaccuracy in the title and body of the act, viz. of taking away tenures *in ca-*

tenures by homage, knight-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage; save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty [27]." A statute, which was a greater acquisition to the civil property of this kingdom than even *magna carta* itself: since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of King Charles extirpated the whole, and demolished both root and branches.

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pite; (Mad. Bar. Ang. 238; Co. Litt. 108, n. 5); for tenure *in capite* signifies nothing more than that the king is the immediate lord of the land-owner; and the land might have been either of military or socage tenure. The same incorrect language was held by the Speaker of the House of Commons in his pedantic address to the throne upon presenting this bill: "Royal sir, your tenures *in capite* are not only turned into a tenure in socage (though that alone will for ever give your Majesty a just right and title to the labour of our ploughs, and the sweat of our brows); but they are likewise turned into a tenure *in corde*. What your Majesty had before in your court of wards, you will be sure to find it hereafter in the exchequer of your people's hearts." (Journ. Dom. Proc. 11 vol. 234).—[CHRISTIAN.]

(27) "The tenure by grand serjeanty still continues, though it is so regulated by the 12th of Chas. II. as to be made in effect free and common socage, except so far as regards the merely honorary part of grand serjeanty; for the first part of the statute, which destroys the incidents to tenures by knight's service, of which grand serjeanty was the highest species, is expressed with a generality sufficient to reach grand serjeanty; but then a proviso follows by which the *honorary* services of this tenure are expressly saved. It is observable, that the proviso for this purpose is penned with an inaccuracy which leads to a very mistaken idea of the incidents to grand serjeanty. The honorary services are preserved with a cautious exception of several burthensome properties, such as marriage, wardship, and voyages royal; to which are added escuage, and the aids pur faire fitz chivaler et file marier, though these latter were certainly quite foreign to grand serjeanty. From this undistinguishing mode of expression, and from the confusion and redundancy so conspicuous in most parts of the statute, we are inclined to infer that those, who attribute the framing of it to Lord Chief Justice Hale, found themselves on a loose report very injurious to the memory of that shining ornament of his profession. See Gilb. Eq. R. 176." (Harg. Co. Litt. 108. a.)

CHAPTER VI.

OF THE MODERN ENGLISH TENURES.

What ancient tenures of socage, &c., reserved by 12 Car. II. c. 14.

ALTHOUGH, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feodal constitution was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room: since, by the statute 12 Car. II., the tenures of socage and frankalmoign, the honorary services of grand serjeanty[1], and the tenure by copy of court roll, were reserved; nay, all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known and subsisting, called free and common socage. And this, being sprung from the same feodal original as the rest, demonstrates the necessity of fully contemplating that antient system; since it is that alone to which we can recur, to explain any seeming or real difficulties, that may arise in our present mode of tenure.

The military tenure, or that by knight-service, consisted of what were reputed the most free and honourable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or *free-socage*, consisted also of free and honourable services; but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up
[79] (since the statute of Charles the Second) almost every other species of tenure. And to this we are next to proceed.

II. Socage tenure.

II. Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate

(1) The *tenure* of grand serjeanty was destroyed by the statute along with the other tenures in chivalry (of which this was one; ante, p. 73). It was the honorary services only which were reserved.

service. And in this sense it is by our antient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton [a]; if a man holds by a rent in money, without any escuage or serjeanty, "*id tenementum dici potest socagium:*" but if you add thereto any royal service, or escuage, to any, the smallest, amount, "*illud dici poterit feodum militare.*" So too the author of Fleta [b]; "*ex donationibus, servitia militaria vel magnae serjantiae non continentibus, oritur nobis quoddam nomen generale, quod est socagium.*" Littleton also [c] defines it to be, where the tenant holds his tenement of the lord by any *certain* service, in lieu of all other services; so that they be not services of chivalry, or knight-service. And therefore afterwards [d] he tells us, that whatsoever is not tenure in chivalry is tenure in socage: in like manner as it is defined by Finch [e], a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage; as to hold by fealty and 20*s.* rent; or, by homage, fealty, and 20*s.* rent; or, by homage and fealty without rent; or, by fealty and certain corporal service, as ploughing the lord's land for three days; or, by fealty only without any other service: for all these are tenures in socage [f].

Free and villein socage.

But socage, as was hinted in the last chapter, is of two sorts: *free*-socage, where the services are not only certain but honourable; and *villein*-socage, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil [g], and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free-socage. Of this tenure we are first to speak; and this both in the nature of its service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr. Somner's etymology of the word [h]; who derives it from the Saxon appellation *soc*, which signifies liberty or privilege, and, being joined to a usual termination, is called *socage*, in Latin, *socagium;* signifying thereby a free

[80]

Free socage.

[a] L. 2, c. 16, § 9.
[b] L. 3, c. 14, § 9.
[c] § 117.
[d] § 118.
[e] L. 147.
[f] Litt. § 117, 118, 119.
[g] L. 3, c. 7.
[h] Gavelk. 138.

or privileged tenure[i]. This etymology seems to be much more just than that of our common lawyers in general, who derive it from *soca*, an old Latin word, denoting (as they tell us) a plough: for that in antient time this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him; but that, in process of time, this service was changed into an annual rent by consent of all parties, and that, in memory of its original, it still retains the name of socage or plough-service[k]. But this by no means agrees with what Littleton himself tells us[l], that to hold by fealty only, without paying any rent, is tenure in socage; for here is plainly no commutation for plough-service. Besides, even services, confessedly of a military nature and original, (as escuage, which, while it remained uncertain, was equivalent to knight-service), the instant they were reduced to a certainty, changed both their name and nature, and were called socage[m]. It was the *certainty* therefore that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore also Britton, who describes lands in socage tenure under the name of *fraunke ferme*[n], tells us, that they are "lands and tenements, whereof the nature of the fee is changed by feoffment *out of chivalry* for *certain* yearly services, and in respect whereof neither homage, ward, marriage, nor relief, can be demanded." [81] Which leads us also to another observation, that if socage tenures were of such base and servile original, it is hard to account for the very great immunities which the tenants of them always enjoyed; so highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edward I. and Charles II., a point of the utmost importance and value to the tenants, to reduce the tenure by knight-service to *fraunk ferme* or tenure by socage. We may therefore, I think, fairly conclude in favour of Somner's etymology, and the liberal extraction of the tenure in free

[i] In like manner Skene, in his exposition of the Scots' Laws, title *socage*, tells us, that it is 'ané kind of holding of lands quhen ony man is infeft *freely*,' &c.

[k] Litt. § 119.

[l] § 118.

[m] § 98, 120.

[n] C. 66.

socage, against the authority even of Littleton himself[2].

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(2) The learned Judge has done Mr. Somner the honour of adopting his derivation of *socage*, which Mr. Somner himself boasts of as a new discovery with no little pride and exultation, as appears from the following sentence: *Derivatio forte hæc nova et nostratibus adhuc inaudita, qui, à soc quatenus vel aratrum vel saltem vomerem signat, vocem derivare satagunt. Quam male tamen, eorum venià, fusius a me jam monitum in tractatu de gavelkind, cap.* 4. Somn. Gloss. *Soca.* But notwithstanding this *unheard-of* derivation has found an able defender in the learned Commentator, the editor is obliged to prefer the old derivation, for the following reasons:—Our most ancient writers derive it from *soca* or *soccus*, a plough; and *sock*, in some parts of the north of England, is the common name for a ploughshare to this day. The following description of *socage* is given by Bracton: *dici poterit socagium à socco, et inde tenentes sockmanni, eo quod deputati sunt, ut videtur, tantummodo ad culturam; et quorum custodia et maritagia ad propinquiores parentes jure sanguinis pertinebant.* (C. 35). This is not only adopted by Littleton and Lord Coke, (Co. Litt. 86), who says that *socagium est servitium socæ*, which is also the interpretation given by Ducange, (voc. *Soc.*); but Sir Henry Spelman, whose authority is high in feudal antiquities, testifies that *feudum ignobile, plebeium vulgare Gall. fief roturier nobili opponitur, et propriè dicimus, quod ignobilibus et rusticis competit, nullo* feudali privilegio *ornatum, nos soccagium dicimus.* Gloss. voc. *Feod.* And *soccagium* he explains by *Gall. roture, fief roturier. Heretages en roture.* (Ib. voc. *Soc.*)

In a law of Edward the Confessor, the sokeman and villein are classed together: *Manbote de villano et sokeman xii oras, de liberis autem hominibus iii mareas.* (C. 12). If we consider the nature of socage tenure, we shall see no reason why it should have the pre-eminence of the appellation of a privileged possession.

The services of military tenure were not left, as suggested by the learned Judge in the preceding page, *to the arbitrary calls of the lord;* for, though it was uncertain when the king would go to war, yet the tenant was *certain* that he could only be compelled to serve forty days in the year; the service therefore was as certain in its extent as that of socage; and the sokeman likewise could not know beforehand when he would be called upon to plough the land, or to perform other servile offices, for the lord. The *milites* are every where distinguished from the *sokemanni*, and the wisdom of the feudal polity appears in no view more strongly than in this: viz. that whilst it secured a powerful army of warriors, it was not improvident of the culture of the lands, and the domestic concerns of the country. But honour was the invigorating principle of that system, and it cannot be imagined that those who never grasped a sword, nor buckled on a coat of mail, should enjoy privileges and distinctions denied to the barons and milites, the companions of their sovereign. The sokemanni were indebted only to their own meanness and insignificance for their peculiar immunities. The king or lord had the profits of the military tenant's estate, during his nonage, in order to retain a substitute with accoutrements, and in a state suitable to the condition of his tenant; at the same time he took care that the minor was instructed in the martial accomplishments of the age. But they disdained to superintend the education of the sokemanni; and as

Free socage of Saxon origin.

Taking this then to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty; retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure, for the more honourable, as it was called, but, at the same time, more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure [o]; the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free* and *common* socage.

As therefore the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit serjeanty*, tenure in *burgage*, and *gavelkind*.

Honorary services of grand serjeanty retained.

We may remember that by the statute 12 Car. II. grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it: for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, &c. at the coronation) are still reserved.

Petit serjeanty.

Now *petit serjeanty* bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's person. Petit serjeanty, as defined by Littleton [p], consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says [q], is but socage in effect; for it is no personal service, but a certain rent: and we may add, it is clearly no predial service, or service of the plough, but in all respects *liberum et commune*

[82]

[o] Wright, 211. [p] § 159. [q] § 160.

they had nothing to apprehend from their opposition, and could expect no accession of strength from their connexions, their marriages therefore were an object of indifference to them. Hence, when the age of chivalry was gone, and nothing but its slavery remained, by no uncommon vicissitude in the affairs of men, the sokemanni derived from their obscurity that independence and liberty which they have transmitted to posterity, and which we are now proud to inherit.—[CHRISTIAN.]

socagium: only being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or petit serjeanty. And *magna carta* respected it in this light, when it enacted [r], that no wardship of the lands or body should be claimed by the king in virtue of a tenure by petit serjeanty [3].

Tenure in *burgage* is described by Glanvil [s], and is expressly said by Littleton [t], to be but tenure in socage: and it is where the king or other person is lord of an antient borough, in which the tenements are held by a rent certain [u]. It is indeed only a kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature. A borough, as we have formerly seen, is usually distinguished from other towns by the right of sending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage therefore, or burgage tenure, is where houses, or lands which were formerly the site of houses, in an antient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments principally on account of their insignificancy, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would scarce have amounted to a knight's fee. Besides, the owners of them being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment as the tenure in chivalry was. And here also we have

Burgage tenure.

[r] Cap. 27.
[s] Lib. 7, cap. 3.
[t] § 162.
[u] Litt. § 162, 163.

(3) "The tenure of petit serjeanty is not named in 12 Chas. II., but the statute is not without its operation on this tenure. It being necessarily a tenure *in capite*, though in effect only so by socage, *livery* and *primer seisin* were of course incident to it on a descent; and these are expressly taken away by the statute from every species of tenure *in capite*, as well socage *in capite* as knight's service *in capite*. But we apprehend that in other respects petit serjeanty is the same as it was before, that it continues in denomination, and still is, a dignified branch of the tenure by socage, from which it only differs in name on account of its reference to war." (Harg. Co. Litt. 108. b. n. 1).

The tenure by which the grants to the Duke of Marlborough and the Duke of Wellington, for their great military services, are held, is of this kind, each rendering a small flag or ensign annually, which is deposited in Windsor Castle.—[CHITTY.]

again an instance, where a tenure is confessedly in socage, and yet could not possibly ever have been held by plough-
[83] service; since the tenants must have been citizens or burghers, the situation frequently a walled town, the tenement a single house; so that none of the owners was probably master of a plough, or was able to use one if he had it. The free socage therefore, in which these tenements are held, seems to be plainly a remnant of Saxon liberty; which may also account for the great variety of customs, affecting many of these tenements so held in antient burgage; the
*Borough English. principal and most remarkable of which is that called *Borough English*; so named in contradistinction as it were to the Norman customs, and which is taken notice of by Glanvil [w], and by Littleton [x]; *viz.* that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father [4]. For which Littleton [y] gives this reason: because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors [z] have indeed given a much stranger reason for this custom, as if the lord of the fee had antiently a right of concubinage with his tenant's wife on her wedding-night; and that therefore the tenement descended not to the eldest, but the youngest son, who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it certainly did in Scotland, (under the name of *mercheta* or *marcheta*), till abolished by Malcolm III. [a] And perhaps a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars; among whom, according to father Duhalde, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as

[w] Ubi supra.
[x] § 165.
[y] § 211.
[z] 3 Mod. Pref.
[a] Seld. Tit. of Hon. 2, 1, 47, n. 188, f. 995. Reg. Mag. l. 4, c. 31.

(4) In some places the custom is confined to the children of the deceased proprietor; in others, in default of children, the youngest brother or other collateral male relation is preferred. But the former custom is the most usual. (See Forr. 976; Com. Dig. *Burough English;* Co. Litt. 110. b.; 1 T. R. 466). In some places the youngest *female* relations lineal and collateral inherit on failure of heirs male. (See Rob. Gavel. 3rd ed. p. 391).

soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle; and go to seek a new habitation. The youngest son, therefore, who continues latest with the father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the sons but one to migrate from the father, which one became his heir [b]. So that possibly this [84] custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors, which Cæsar and Tacitus describe. Other special customs there are in different burgage tenures; as that, in some, the wife shall be endowed of *all* her husband's tenements [c], and not of the third party only, as at the common law: and that, in others, a man might dispose of his tenements by will [d], which, in general, was not permitted after the conquest till the reign of Henry the Eighth; though in the Saxon times it was allowable [e]. A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty.

Other customs in burgage tenures.

The nature of the tenure in *gavelkind* affords us a still stronger argument [5]. It is universally known what struggles the Kentish men made to preserve their antient liberties, and with how much success those struggles were attended [6]. And as it is principally here that we meet with the custom of gavelkind, (though it was and is to be found in some other parts of the kingdom [f],) we may fairly conclude that this was a part of those liberties; agreeably to Mr. Selden's opinion, that gavelkind before the Norman conquest was the general custom of the realm [g]. The distinguishing

Gavelkind, customs of.

[b] *Pater cunctos filios adultos a se pellebat, praeter unum quem haeredem sui juris relinquebat.* (Walsingh. Upodigm. Neustr. c. 1).

[c] Litt. § 166.

[d] § 167.

[e] Wright, 172.

[f] Stat. 32 Hen. VIII. c. 29. Kitch. of Courts, 200.

[g] *In toto regno, ante ducis adventum, frequens et usitata fuit: postea caeteris adempta, (sed privatis quorun-*

(5) See, in general, Robinson on Gavelkind.

(6) The best historians shew that the Kentish men owed what the learned commentator calls the preservation of their ancient liberties, not, as supposed by him, to their successful resistance of the invader, but to their policy in yielding a ready and apparently spontaneous submission to his authority. Bac. Ab. *Gavelkind*, A.—[CHITTY.]

properties of this tenure are various; some of the principal are these: 1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen[h]. 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being, "the father to the bough, the son to the plough[i 7]." 3. In most places he had a power of devising lands by will, before the statute for that purpose was made[k]. 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together[l]; [85] which was indeed antiently the most usual course of descent all over England[m], though in particular places particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain[n 8]. Wherefore, by a charter of King John[o], Hubert, archbishop of Canterbury, was authorized to *exchange* the gavelkind tenures holden of the see of Canterbury into te-

dam locorum consuetudinibus alibi postea regerminans), *Cantianis solum integra et inviolata remansit.* (Analect. l. 2, c. 7).

[h] Lamb. Peramb. 614.

[i] Lamb. 634.

[k] F. N. B. 198. Cro. Car. 561.

[l] Litt. § 210.

[m] Glanvil. l. 7, c. 3.

[n] Wright, 211.

[o] Spelm. Cod. Vet. Leg. 355.

(7) "But if tenant in gavelkind, being indicted for felony, absent himself and is outlawed, after proclamation made for him in the county, (or if formerly he had taken sanctuary, and had abjured the realm), his heir shall reap no benefit by the custom, but the lands shall escheat to the lord; and the king shall have year, day, and waste in them, if holden of another, in like manner as the common law directs as to lands which are not subject to the custom of gavelkind." (Rob. Gav. 229).

(8) The *tenure* of gavelkind must be distinguished from the *custom* of descent in the manner of gavelkind, which latter exists in respect of copyhold lands in various places; but is unattended by any of the other incidents to the tenure of gavelkind. (See Robinson on Gavelkind, pp. 42, 49, 3rd ed.)

The gavelkind descent of lands in Ireland was an incident to the custom of *tanistry*, and as such fell to the ground with its principal, in consequence of a solemn judgment against the latter, in a case of the 5th of James I. (Dav. Rep. 28). But in the reign of Queen Anne the policy of weakening the Roman Catholic interest in Ireland was the cause of an Irish statute to make the lands of papists descendible according to the gavelkind custom, unless the heir conformed within a limited time. (Rob. Gav. 17). But this was repealed by an Irish statute of 17 & 18 Geo. 3, c. 49, s. 1. (Harg. Co. Litt. 176. a.)

nures by knight's-service; and by statute 31 Hen. VIII. c. 3, for disgavelling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future *like other lands which were never holden by service of socage*[9]. Now the immunities which the tenants in gavelkind enjoyed were such, as we cannot conceive should be conferred upon mere ploughmen and peasants; from all which I think it sufficiently clear that tenures in free socage are in general of a nobler original than is assigned by Littleton, and after him by the bulk of our common lawyers.

Tenure in free socage partakes of feodal nature.

Having thus distributed and distinguished the several species of tenure in free socage, I proceed next to shew that this also partakes very strongly of the feodal nature. Which may probably arise from its antient Saxon original; since (as was before observed[p]) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems therefore reasonable to imagine, that socage tenure existed in much the same state before the conquest as after; that in Kent it was preserved with a high hand, as our histories inform us it was; and that the rest of the socage tenures dispersed through England escaped the general fate of other property, partly out of favour and affection to their particular owners, and partly from their own insignificancy: since I do not apprehend the number of socage tenures soon after the conquest to have been very considerable, nor their value by any means large: till by successive charters of enfranchisement granted to the tenants, which are particularly mentioned by Britton[q], their number and value began to swell so far, as to make a distinct, and justly envied, part of our English system of tenures.

[86]

Comparative view of incidents, similar in socage te-

However this may be, the tokens of their feodal original will evidently appear from a short comparison of the inci-

[p] Page 48. [q] C. 66.

(9) The gavelkind lands of several other persons in Kent have been made descendible according to the rules of the common law, by special statutes. (Rob. Gavelk. 75). But none of these acts appear to have affected the tenure of these lands, but only to have destroyed the partible descent. (See Hardr. 325; 1 Sid. 135; 1 Lev. 79; T. Raym. 59, 77).

nure and ancient chivalry.

dents and consequences of socage tenure with those of tenure in chivalry; remarking their agreement or difference as we go along.

1. Both held of superior lord.

1. In the first place, then, both were held of superior lords; one of the king, either immediately, or as lord paramount, and (in the latter case) of a subject or mesne lord between the king and the tenant[10].

2. Rent, or service.

2. Both were subject to the feodal return, render, rent, or service of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from its nature uncertain; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate, (though perhaps nothing more than bare fealty), and so continues to this day.

3. Oath of fealty.

3. Both were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant[r]. Which oath of fealty usually draws after it suit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court baron; if it be only for the reason given by Littleton[s], that if it be neglected, it will by long continuance of time grow out of memory (as doubtless it frequently hath done) whether the land be holden of the lord or not; and so he may lose his seignory, and the profit which may accrue to him by escheats and other contingencies[t].

4. Aids.

4. The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daughter[u]: which were fixed by the statute Westm. 1, c. 36, at 20*s.* for every 20*l.* *per annum* so held; as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but were all abolished by the statute 12 Car. II.

[87]

[r] Litt. § 117, 131.

[s] § 130.

[t] *Eo maxime praestandum est, ne dubium reddatur jus domini et vetustate temporis obscuretur.* (Corvin. Jus Feud. l. 2, t. 7).

[u] Co. Litt. 91.

(10) The word "one" in this paragraph should be omitted.

5. Relief is due upon socage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5*l.*, or one quarter of the supposed value of the land; but a socage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small[w]: and therefore Bracton[x] will not allow this to be properly a relief, but *quædam præstatio loco relevii in recognitionem domini.* So too the statute 28 Edw. I. c. 1, declares, that a free sokeman shall give *no relief,* but shall double his rent after the death of his ancestor, according to that which he hath used to pay his lord, and shall not be grieved above measure. Reliefs in knight-service were only payable, if the heir at the death of his ancestor was of full age: but in socage they were due even though the heir was under age, because the lord has no wardship over him[y]. The statute of Charles II. reserves the reliefs incident to socage tenures; and therefore, wherever lands in fee-simple are holden by a rent, relief is still due of common right upon the death of a tenant[z 11]. 5. Reliefs.

6. Primer seisin was incident to the king's socage tenants *in capite,* as well as to those by knight-service[a]. But tenancy *in capite* as well as primer seisins are, among the other feodal burthens, entirely abolished by the statute. 6. Primer seisin.

7. Wardship is also incident to tenure in socage; but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor ever did, belong to the lord of the fee; because, in this tenure, no military or other personal service being required, there was no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant; but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. The 7. Wardships. [88]

[w] Litt. § 126.
[x] L. 2, c. 37, § 8.
[y] Litt. § 127.
[z] 3 Lev. 145.
[a] Co. Litt. 77.

(11) As to the distinction between socage reliefs payable by special custom, and such as arise from express reservation, see Hargr. Co. Litt. 93. a.

guardian must be such a one, to whom the inheritance by no possibility can descend; as was fully explained, together with the reasons for it, in the former book of these commentaries[b]. At fourteen this wardship in socage ceases; and the heir may oust the guardian, and call him to account for the rents and profits[c]: for at this age the law supposes him capable of chusing a guardian for himself. It was in this particular of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it: that young heirs, being left at so tender an age to chuse their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the same statute 12 Car. II. c. 24, enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty-one. And, if no such appointment be made, the court of Chancery will frequently interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin[12].

8. Marriage.

8. Marriage, or the *valor maritagii*, was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage[d]. For, the law in favour of infants is always jealous of guardians, and therefore in this case it made them account, not only for what they *did*, but also for what they *might*, receive on the infant's behalf; lest by some collusion the guardian should have received the value, and not brought it to account: but the statute having destroyed all values of marriages, this doctrine of course hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenure were

[89]

[b] Vol. 1, page 461. [c] Litt. § 123. Co. Litt. 89. [d] Litt. § 123.

(12) As to wardship, see Macpherson on Infants, 19 et seq.

so diametrically opposite to those in knight-service, and so entirely agree with those parts of King Edward's laws, that were restored by Henry the First's charter, as might alone convince us that socage was of a higher original than the Norman conquest.

9. Fines for alienation were, I apprehend, due for lands holden of the king *in capite* by socage tenure, as well as in case of tenure by knight-service: for the statutes that relate to this point, and Sir Edward Coke's comment on them [e], speak generally of all tenants *in capite*, without making any distinction: but now all fines for alienation are demolished by the statute of Charles the Second.

9. Fines for alienation.

10. Escheats are equally incident to tenure in socage, as they were to tenure by knight-service; except only in gavelkind lands, which are (as is before mentioned) subject to no escheats for felony, though they are to escheats for want of heirs [f].

10. Escheats, except in gavelkind lands.

Thus much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the restoration in 1660, when the former was abolished and sunk into the latter: so that lands of both sorts are now holden by the one universal tenure of free and common socage.

Lands are now of free and common socage tenure only.

The other grand division of tenure, mentioned by Bracton as cited in the preceding chapter, is that of *villenage*, as contradistinguished from *liberum tenementum*, or frank tenure. And this (we may remember) he subdivides into two classes, *pure* and *privileged* villenage: from whence have arisen two other species of our modern tenures.

Villenage, pure or privileged.

[90]

III. From the tenure of pure villenage have sprung our present *copyhold* tenures, or tenure by copy of court-roll at the will of the lord: in order to obtain a clear idea of which it will be previously necessary to take a short view of the original and nature of manors.

III. Copyholds.

Manors are in substance as antient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day [g]: just

Of manors.

[e] 1 Inst. 43. 2 Inst. 65, 66, 67. [f] Wright, 210. [g] Co. Cop. § 2 & 10.

as we observed of feuds, that they were partly known to our ancestors, even before the Norman conquest. A manor, *manerium, a manendo,* because the usual residence of the owner, seems to have been a district of ground, held by lords or great personages, who kept in their own hands so much land as was necessary for the use of their families, which were called *terræ dominicales* or *demesne* lands; being occupied by the lord, or *dominus manerii,* and his servants [13]. The other, or *tenemental,* lands they distributed among their tenants: which, from the different modes of tenure, were distinguished by two different names. First, *book-land,* or charter-land, which was held by deed under certain rents and free-services, and in effect differed nothing from free-socage lands [h]: and from hence have arisen most of the freehold tenants who hold of particular manors, and owe suit and service to the same [14]. The other species was

[h] Co. Cop. § 3.

(13) The existence of these demesne lands is essential to a manor, being the characteristic which distinguishes it from a mere *seignory in gross.* The demesne lands may of course be granted for years, for life, or in tail, without permanently affecting the manor, although they cease to be parcel of the manor during the continuance of such estate, (Litt. s. 591); and, when held at the will of the lord according to the custom of the manor, constitute the copyholds of the estate. The existence of a copyhold tenancy of the demesne lands, that is to say, of copyholds at all, is not essential to a manor. (Litt. s. 73).

The jurisdiction of the court baron, in respect of lands within the manor, is (except as to free-bench) taken away by the statute 3 & 4 Will. 4, c. 27, s. 36.

Although a mansion-house is not now a necessary part of a manor, yet such an appendage appears formerly to have been always included in the notion of a manor, as the place at which the tenants were to render and perform their services and duties. (See 5 Man. & R. 154, n.) This consideration seems to decide the question between Lord Coke's derivation of the word from *mesner* to govern or guide, and that given in the text, in favour of the latter. The connexion between *manerium, manere,* and the old french word *mainor,* a mansion-house, or *residence,* is obvious. (See Perk. s. 670).

(14) These freeholders are essential to the existence of a manor, and form the court baron (*baron* formerly signifying *freeman*), which is a common-law court. Unless there be two freeholders holding of the lord of the manor as such, the court cannot be held; and if such deficiency of freeholders is occasioned by the absolute extinction of the seigniory in respect of all the freeholds held of the manor (which may happen either by a release of seignorial rights to the freeholders, or by a purchase or other acquisition of the freehold by the lord, thereby drowning or merging the seigniory), the manor is permanently extinguished; but a want of suitors, arising from the circumstance that all the freeholds are vested in one

called *folk-land,* which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion; being indeed land held in villenage, which we shall presently describe more at large [15]. The residue of the manor being uncultivated, was termed the lord's waste, and served for public roads, and for common of pasture to the lord and his tenants. Manors were formerly called baronies, as they still are lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemeanors and nusances within the manor; and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at the least, the manor itself is lost[i] [16].

[91]

Manors formerly made within manors.

In the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves: which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these ma-

Honours.

[i] Co. Cop. § 31.

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tenant, occasions merely a suspension of the manor, which ceases as soon as, by alienation or other means, the freeholds become divided among several tenants. Manors thus extinguished or suspended are called manors in reputation, and retain many of the incidents which attached to them in their perfect state, (3 T. R. 447; 4 Id. 446; 10 East, 259); and in particular, the extinction of the manor does not put an end to the lord's jurisdiction to hold customary courts, and to take surrenders and make grants of copyholds. (Co. Tr. 53). In fact, except for the purpose of holding a court baron, the manor appears to exist as fully after the failure of freeholders as before.

(15) The lands here designated *folk-land* are no other than the modern copyholds, and seem rather to form part of the demesne lands of the lord of the manor. The demesne lands do not lose that character by being let for years, and still less should they do so by a mere tenancy at will, such as the copyhold tenure is, though strengthened, in point of beneficial title, by custom. (Fitzh. Ab. *Auncien Demesne,* pl. 33; Co. Cop. s. 14).

(16) That is to say, by failure of suitors to the court baron—failure of copyholders or suitors to the *customary court* is immaterial; the suitors to the customary court are mere assistants to the lord, who alone, in person or by his steward, exercises judicial authority; but in the court baron the freeholders are the judges. (4 T. R. 446; Co. Litt. 58. a., 117. b.)

nors; and his seignory is frequently termed an honour, not a manor, especially if it hath belonged to an antient feodal baron, or hath been at any time in the hands of the crown. In imitation whereof these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*, till the superior lords observed, that by this method of subinfeudation they lost all their feodal profits of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the *terre-tenant*, or him who occupied the land: and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the thirty-second chapter of *magna carta*, 9 Hen. III. (which is not to be found in the first charter granted by that prince, nor in the great charter of King John[i]), that no man should either give or sell his land, without reserving sufficient to answer the demands of his lord; and, afterwards, the statute of Westm. 3, or *quia emptores*, 18 Edw. I. c. 1, which directs, that, upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it[17]. But these provisions not extending to the king's own tenants *in capite*, the like law concerning them is declared by the statutes of *prerogativa regis*, 17 Edw. II. c. 6, and of 34 Edw. III. c. 15, by which last all subinfeudations, previous to the reign of King Edward I., were confirmed: but all subsequent to that period were left open to the king's prerogative. And from hence it is clear, that all manors existing at this day must have existed as early as king Edward the First: for it is essential to a manor, that there be tenants who hold of the lord; and, by the operation of these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a

Statutes against subinfeudation.

[92]

No new manor can be made since statute 18 Edw. I. c. 1.

[i] See the Oxford editions of the charters.

(17) The words of the act are, "That it shall be lawful to every freeman to sell, at his own pleasure, his lands and tenements, or part of them, so that the feoffee shall hold the same of the chief lord of the same fee, by such service and customs *as his feoffor held before.*"

common lord since the statute of *quia emptores*, could create any new tenants to hold of himself[18].

Now, with regard to the folk-land, or estates held in villenage, this was a species of tenure neither strictly feodal, Norman, or Saxon; but mixed and compounded of them all[k]: and which also, on account of the heriots that usually attend it, may seem to have somewhat Danish in its composition. Under the Saxon government there were, as Sir William Temple speaks[l], a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were removeable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable, that they, who were strangers to any other than a feodal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition[m]. This they called villenage, and the tenants villeins, either from the word *vilis*, or else, as Sir Edward Coke tells us[n], *a villa*; because they lived chiefly in villages, and were employed in rustic works of the most sordid kind: resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

Folk-land.

Villeins.

These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land: or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferrable by deed from one owner to another[o]. They could not leave their lord without his permission; but if they ran away, or were purloined from him, might be claimed and recovered by ac-

[93]

Villeins either regardant or in gross.

[k] Wright, 215.
[l] Introd. Hist. Engl. 59.
[m] Wright, 217.
[n] 1 Inst. 116.
[o] Litt. § 181.

(18) See, however, 5 Man. & Ry. 156, n.

tion, like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices [p]: and their services were not only base, but uncertain both as to their time and quantity [q]. A villein, in short, was in much the same state with us, as Lord Molesworth [r] describes to be that of the boors in Denmark, and which Stiernhook [s] attributes also to the *traals* or slaves in Sweden; which confirms the probability of their being in some degree monuments of the Danish tyranny. A villein could acquire no property either in lands or goods: but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity [t].

In many places also a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord [u]: and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property [w]. For the children of villeins were also in the same state of bondage with their pa-
[94] rents; whence they were called in Latin, *nativi*, which gave rise to the female appellation of a villein, who was called a *neife* [x]. In case of a marriage between a freeman and a neife, or a villein and a freewoman, the issue followed the

[p] Litt. § 172.

[q] *Ille qui tenet in villenagio faciet quicquid ei praeceptum fuerit, nec scire debet sero quid facere debet in crastino, et semper tenebitur ad incerta.* (Bracton, l. 4, tr. 1, c. 28, § 5) [19].

[r] C. 8.

[s] De Jure Sueonum, l. 2, c. 4.

[t] Litt. § 177.

[u] Co. Litt. 140.

[w] Litt. § 202.

[x] Ibid. § 186.

(19) This is an eloquent description of slavery. Villeins were not protected by *Magna Carta: nullus* liber *homo capiatur vel imprisonetur*, &c., was cautiously expressed, to exclude the poor villein; for, as Lord Coke tells us, the lord might beat his villein, and, if it be without cause, he cannot have any remedy. What a degraded condition for a being endued with reason!—[CHRISTIAN.] And in another part of *Magna Carta*, there is an evident allusion to villeins, as part of the fixtures or chattels annexed to the freehold: "Custos terræ hujusmodi hæredis non capiat de terrâ hæredis nisi rationabiles exitus, et hoc sine *destructione et vasto hominum* et rerum."

condition of the father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus sequitur ventrem.* But no bastard could be born a villein, because, by another maxim of our law, he is *nullius filius:* and as he can *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it[y]. The law however protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord: for he might not kill or maim his villein[z]; though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor, or the maim of his own person[20]. Neifes indeed had also an appeal of rape, in case the lord violated them by force[a].

Villeins might be enfranchised by manumission, which is either express or implied: express, as where a man granted to the villien a deed of manumission[b]: implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years[c]; for this was dealing with his villein on the footing of a freeman, it was in some of the instances giving him an action against his lord, and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him[d]; for, as the lord might have a short remedy against his villein, by seizing his goods, (which was more than equivalent to any damages he could recover), the law, which is always ready to catch at any thing in favour of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied manumission. But, in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital

Enfranchisement of villeins.

[95]

[y] Litt. § 187, 188.
[z] Ibid. § 189, 194.
[a] Ibid. § 190.
[b] Ibid. § 204.
[c] Ibid. §§ 204, 205, 206.
[d] Ibid. § 208.

(20) This is incorrect, for the damages recovered for the maim of his own person might be immediately seized by his lord, and so no benefit could have accrued to him from such a suit. But the lord was subject to an indictment on the king's behalf. (Litt. s. 194).—[CHITTY.]

punishment on his villein without calling in the assistance of the law.

Gradually raised their condition to copyholders.

Villeins, by these and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the goodnature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the same services, to hold their lands in spight of any determination of the lord's will. For, though in general they are still said to hold their estates at the will of the lord [21], yet it is such a will as is agrecable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to shew for their estates but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court-roll*, and their tenure itself a *copyhold* [e 22].

Thus copyhold tenures, as Sir Edward Coke observes [f], although very meanly descended, yet come of an antient house; for, from what has been premised, it appears that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before
[96] were held absolutely at the lord's will [23]. Which affords a

[e] F. N. B. 12. [f] Cop. § 32.

(21) An estate held by copy of court-roll according to the custom of the manor, is a copyhold for all purposes at the present day, though not expressed to be held at the will of the lord. (2 Cr., M. & R. 503).

(22) See Hallam, Mid. Ages, vol. 2, p. 304, et seq.

(23) Lord Loughborough is inclined to question this origin of copyholds: "I cannot help doubting (observes that learned lord) whether this deduction is not founded in mistake. The circumstance which first led me to entertain the doubt is, that, in those parts of Germany from whence the Saxons migrated into England, there *exists, at*

very substantial reason for the great variety of customs that prevail in different manors, with regard both to the descent of the estates, and the privileges belonging to the tenants. And these encroachments grew to be so universal, that when tenure in villenage was virtually abolished (though copyholds were reserved) by the statute of Charles II., there was hardly a pure villein left in the nation. For Sir Thomas Smith [g] testifies, that in all his time (and he was secretary to Edward VI.) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery. For he tells us, that "the holy fathers, monks, and friars had in their confessions, and specially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was, for one Christian man to hold another in bondage: so that temporal men, by little and little, by reason of that terror in their consciences, were glad to manumit all their villeins. But the said holy fathers, with the abbots and priors, did not in like sort by theirs, for they also had a scruple in conscience to impoverish and despoil the church so much, as to manumit such as were bond to their churches, or to the manors which the church had gotten; and so kept their villeins still [24]." By these several means the generality of villeins in the kingdom have long ago sprouted up into copyholders: their persons being enfranchised by manumission or long acquiescence; but their estates, in strictness, remaining subject to the same

Pure villenage ceased before Charles II.

[g] Commonwealth, b. 3, c. 10.

this day, a species of tenure exactly the same with our copyhold estates; and there exists likewise, *at this day*, a complete state of *villenage;* so that both stand together, and are not one tenure growing out of another, and by degrees assuming its place, &c. &c. What I have stated I found in a very accurate treatise of German law by Selchow, one of the professors of the university of Gottingen, entitled *Elementa Juris privati Germanici*. This seems sufficient to negative the idea that copyholders sprang out of villeins. In England, villenage has ceased, and copyholds remain; but here, as in other countries, they both prevailed at the same time." (Doug. 698).—[CHRISTIAN.]

(24) The last claim of villenage, which we find recorded in our courts, was in the 15 Jac. I. (*Pigg* v. *Caley*, Noy, 27; 11 Harg. St. Tr. 342).—[CHRISTIAN.] See Barrington on the Statutes, 307.

servile conditions and forfeitures as before; though, in general, the villein services are usually commuted for a small pecuniary quit rent[h].

[97]

Principal rules in copyhold tenures.

As a farther consequence of what has been premised, we may collect these two main principles, which are held[i] to be the supporters of the copyhold tenure, and without which it cannot exist: 1. That the lands be parcel of, and situate within that manor, under which it is held[25]. 2. That they have been demised, or demisable, by copy of court-roll immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day[26].

1. Parcel of manor.

2. Demisable immemorially by copy of court-roll.

Inheritable or for life, according to the custom.

In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are stiled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only: for the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death; nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will[27].

[h] In some manors the copyholders were bound to perform the most servile offices, as to hedge and ditch the lord's grounds, to lop his trees, and reap his corn, and the like; the lord usually finding them meat and drink, and sometimes (as is still the use in the highlands of Scotland) a minstrel or piper for their diversion. (Rot. Maner. de Edgware Com. Mid.). As in the kingdom of Whidah, on the slave coast of Africa, the people are bound to cut and carry in the king's corn from off his demesne lands, and are attended by music during all the time of their labour. (Mod. Un. Hist. xvi. 429).

[i] Co. Litt. 58.

(25) This is no more than to say, that every copyhold estate is parcel of the manor of which it is held. But a piece of land wholly isolated from the rest of the manor, and in a different parish, may be parcel of a manor, and so within it. (4 Rep. 26).

(26) See 1 Watkins on Copyhold, tit. *Grants*, pages 33, 51, &c.; 2 T. R. 424. According to 3 Bos. & P. 346; 2 M. & Sel. 504; 2 B. & Al. 189; and 2 Campb. 264-5, without a special custom, the lord cannot make a new grant of waste to hold as copyhold, though slight evidence of a custom will suffice —[CHITTY.] As to the destruction of the copyhold tenure, see infra, p. 149, n.

(27) As soon as the death of a copyhold tenant is known to the homage, it should be presented at the next general court, and three several proclamations

Incidents of copyhold tenures.

The fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, services, (as well in rents as otherwise), reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. But, besides these, copyholds have also heriots, wardship, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter[k], are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seized them even in the villein's lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only. Wardship, in copyhold estates, partakes both of that in chivalry and that in socage. Like that in chivalry, the lord is the legal guardian[28]; who usually assigns some rela-

Heriots.

[98]

Wardship.

[k] See ch. 28.

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should be made at three successive general courts, for the heir or other person claiming title to the land whereof such copyholder died seised, to come in and be admitted. Proclamation is said to be unneccessary where the heir appears in court, either personally or by attorney; but until such presentment and proclamations, the heir, though of full age, is not bound to come into court to be admitted. If, after the third proclamation, no such person claims to be admitted, a precept may be issued by the lord, or steward, to the bailiff of the manor, to seize the lands into the lord's hands for want of a tenant, (Watkins on Copyholds, 239; H. Chitty on Descents, 165; 1 Keb. 287; Kitch. 246; 1 Leon. 100; 3 Id. 221; 4 Id. 30; 1 Scriv. 341-2); but the seizure must be quousque &c., and not as an absolute forfeiture, unless there be a custom to warrant it. (3 T. R. 162).

The admittance is merely as between the lord and the tenant, (Cowp. 741); and the title of the heir to a copyhold is, as against all but the lord, complete without admittance. The ceremony of admittance is said to be for the lord's sake only; and therefore, in one case, the court refused a mandamus to the lord to admit a person who claimed by descent. But a mandamus ought to be granted, if a proper case be laid before the court. (1 Wils. 283). And in one case the court, as a matter of right, granted a mandamus to admit a person claiming by descent. (3 B. & Cr. 172). If the heir is refused admittance, he shall be terre-tenant, even though the lord loses his fine, (Comyn, 245); for the lord is only trustee for the heir, and merely the instrument of the custom for the purpose of admittance. (1 Watk. Cop. 281; Cro. Car. 16; Co. Cop. s. 41). So also is the steward; and therefore, an admittance by him will be good, though he acts by a counterfeit or voidable authority, it being sufficient if in appearance he be steward. (Co. Cop. 124).—[CHITTY.]

(28) This authority of the lord must be by virtue of a special custom in a manor: for by the 12 Cha. 2, c. 24, ss. 8 and 9, a father may appoint a

Fines.

tion of the infant tenant to act in his stead; and he, like guardian in socage, is accountable to his ward for the profits. Of fines, some are in the nature of primer seisins, due on the death of each tenant, others are mere fines for alienation of the lands; in some manors only one of these sorts can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom; but, even when arbitrary, the courts of law, in favour of the liberty of copyholders, have tied them down to be *reasonable* in their extent: otherwise they might amount to a disherison of the estate[29]. No fine, therefore, is allowed to be taken upon descents and alienations (unless in particular circumstances[30]) of more than two years' improved value of the estate[k31]. From

[k] 2 Ch. Rep. 134.

guardian by his will as to the copyholds of his child; and though this custom is not abolished in terms, nor can be said to be taken away by implication in this statute, yet, where the custom does not exist in a manor, the better opinion is that the statute will operate, (1 Scriv. Cop. 102, 471); and even where the custom prevails, Mr. Watkins thinks, against the opinion of Lord Coke, (Cop. s. 23), the father may by this statute appoint a guardian of the *person* of his child, if not of his copyhold property. (See 2 Watk. on Copyh. 104-5).—[CHITTY.]

(29) As in the case where the lord is not bound to renew, or, being so bound by the custom, the copyholder is allowed to put in more than one life at a time; and consequently, several admissions are made at the same time, for which an increased fine may be fairly demanded. The rule generally is to take for the second life half what the immediate tenant for life pays, and for the third half what the second pays. But this must be understood of persons taking *successively;* for if they take as joint tenants, or as tenants in common, the single fine only would be due, to be apportioned in the latter case, each paying severally. (Watk. on Copyh. vol. 1, 312; Scriven on Copyh. 374). It seems that co-parceners are entitled to be admitted to copyhold tenements as one heir, and upon payment of one set of fees. (3 B. & Cr. 173).—[CHITTY.]

(30) As where the admission is a voluntary act of the lord; which it is in some copyholds, grantable for lives, without renewal, &c.

(31) It is now established as a universal rule, that where the fine upon the descent or alienation of a copyhold is arbitrary, it cannot be more than two years' improved value. In ascertaining the yearly value, the quit-rents must be deducted, but not the land-tax. (Doug. 724). The fine may be recovered by the lord in an action of assumpsit. (Ib.) But he has no right to it till the admittance of the tenant. (2 T. R. 484). The lord assesses the fine at his peril; if he assess it too high, he is not entitled to recover it. But the assessment need not be entered on the roll of the court. (6 East, 56).—[CHRISTIAN.] See as to fines, Doug. 724, n.; 7 Bingh. 327; 2 B. & Ad. 350; 5 Mee. & W. 608; 10 Ad. & El. 236; 3 Scott, 623.

this instance we may judge of the favourable disposition that the law of England (which is a law of liberty) hath always shewn to this species of tenants; by removing, as far as possible, every real badge of slavery from them, however some nominal ones may continue. It suffered custom very early to get the better of the express terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the custom of the manor: and, where no custom has been suffered to grow up to the prejudice of the lord, as in this case of arbitrary fines, the law itself interposes with an equitable moderation, and will not suffer the lord to extend his power so far as to disinherit the tenant.

Thus much for the antient tenure of *pure* villenage, and the modern one of *copyhold at the will of the lord*, which is lineally descended from it.

IV. Privileged villenage.

IV. There is yet a fourth species of tenure, described by Bracton under the name sometimes of *privileged* villenage, and sometimes of *villein-socage*[32]. This, he tells us[1], is such as has been held of the kings of England from the conquest downwards; that the tenants herein, "*villana faciunt servitia, sed certa et determinata;*" that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can: but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, viz. the tenure in *antient demesne;* to which, as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium.*

[99]

Antient demesne.

Antient demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror; and so appear

[1] L. 4, tr. 1, c. 28, § 5.

(32) Bac. Ab. tit. *Tenure*, P.; Com. Dig. *Villenage;* Cru. Dig. vol. 1, p. 295.

to have been by the great survey in the Exchequer called domesday book [m]. The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies [n], continued for a long time pure and absolute villeins, dependent on the will of the lord: and those who have succeeded them in their tenures now differ from common copyholders in only a few points [o]. Others were in great measure enfranchised by the royal favour: being only bound in respect of their lands to perform some of the better sort of villein services, but those determinate and certain; as to plough the king's land for so many days, to supply his court with such a quantity of provisions, or other stated services; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them [p]; as to try the right of their property in a peculiar court of their own, called a court of antient demesne, by a peculiar process denominated a writ of *right close* [q]; not to pay toll or taxes; not to contribute to the expenses of knights of the shire; not to be put on juries; and the like [r].

[100] These tenants, therefore, though their *tenure* be absolutely copyhold, yet have an *interest* equivalent to a freehold: for notwithstanding their services were of a base and villenous original [s], yet the tenants were esteemed in all other respects to be highly privileged villeins; and especially for that their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: "*et ideo,*" says Bracton, "*dicuntur liberi.*" Britton also, from such their freedom, calls them absolutely *sokemans,* and their tenure *sokemanries;* which he describes [t] to be "lands and tenements, which are not held by knight-service, nor by grand serjeanty, nor by petit, but by simple services, being, as it were, lands enfranchised by the king or his predecessors from their antient demesne." And the same name is also given them in Fleta [u]. Hence Fitzherbert observes [w], that no lands are antient demesne, but lands

[m] F. N. B. 14, 16.
[n] C. 66.
[o] F. N. B. 228.
[p] 4 Inst. 269.
[q] F. N. B. 11.
[r] Ibid. 14.
[s] Gilb. Hist. of Exch. 16 and 30.
[t] C. 66.
[u] L. 1, c. 8.
[w] N. B. 13.

holden in socage: that is, not in free and common socage, but in this amphibious subordinate class of villein-socage. And it is possible, that as this species of socage tenure is plainly founded upon predial services, or services of the plough, it may have given cause to imagine that all socage tenures arose from the same original; for want of distinguishing, with Bracton, between free socage or socage of frank-tenure, and villein-socage or socage of antient demesne.

Lands holden by this tenure are therefore a species of copyhold[33], and as such preserved and exempted from the operation of the statute of Charles II. Yet they differ from common copyholds, principally in the privileges beforementioned: as also they differ from freeholders by one especial mark and tincture of villenage, noted by Bracton, and remaining to this day, viz. that they cannot be conveyed from man to man by the general common law conveyances of feoffment, and the rest; but must pass by surrender to the lord or his steward, in the manner of common copyholds: yet with this distinction[x], that, in the surrender [101] of these lands in antient demesne, it is not used to say "*to hold at the will of the lord*" in their copies, but only, "*to hold according to the custom of the manor*[34]."

[x] Kitchen on Courts, 194.

(33) This is erroneous, see the next note.

(34) Besides the antient demesne lands held freely by the grant of the king, and those called customary freeholds held of a manor which is antient demesne, but not at the will of the lord, there is a third class, often, as in the text, but erroneously, called tenants in antient demesne, who hold of a manor which is antient demesne, but hold by copy of court-roll at the will of the lord, and are called copyholders of base tenure. The neglect to keep in mind these distinctions sometimes produces perplexity and confusion in questions respecting the tenure in antient demesne. (See Scriven on Copyholds, 656). It is only the freeholders of the manor who are truly tenants in antient demesne, and their lands pass by common-law conveyances; they form the court of antient demesne, which is analogous to the court baron. The copyholders form the customary court. (See Third Real Property Report, p. 13; 3 Bos. & P. 382).

There are some estates held according to the custom of a manor, but not by copy of court-roll, nor at the will of the lord. "These customary estates, known by the denomination of *tenant right*, are peculiar to the northern parts of England, in which border-services against Scotland were antiently performed before the union of England and Scotland under the same sovereign. And although these appear to have many qualities and incidents, which do Tenant right.

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both antient and modern, in which we cannot but remark the mutual connection and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these tenures have in process of time undergone, from the Saxon æra to the 12 Car. II., all lay tenures are now in effect reduced to two species: *free* tenure in common socage, and *base* tenure by copy of court-roll.

Spiritual tenure.

I mentioned *lay* tenures only; because there is still behind one other species of tenure, reserved by the statute of Charles II., which is of a *spiritual* nature, and called the tenure in frankalmoign.

Frankalmoign.

V. Tenure in *frankalmoign, in libera eleemosyna,* or free alms, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors for ever[y] [35]. The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty, (which is incident to all other services but this[z]), because this divine service was of a higher and more exalted nature[a]. This is the tenure, by which almost all the antient monas-

[y] Litt. § 133. [z] Ibid. 131. [a] Ibid. 135.

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not properly belong to villenage tenure, either pure or privileged (and out of one or other of these species of villenage all copyhold is derived); and also have some which savour more of military service by escuage uncertain, which, according to Litt. s. 99, is knight's service; and although they seem to want some of the characteristic qualities and circumstances which are considered as distinguishing this species of tenure, viz. the being holden at the will of the lord, and also the usual evidence of title by copy of court-roll; and are alienable also contrary to the usual mode by which copyholds are aliened, viz. by deed and admittance thereon, (if indeed they could be immemorially aliened at all by the particular species of deed stated in the case, viz. a bargain and sale, and which at common law could only have transferred the use);—I say, notwithstanding all these anomalous circumstances, it seems to be now so far settled in courts of law, that these customary tenant-right estates are not freehold, but that they in effect fall within the same consideration as copyholds, that the quality of their tenure in this respect cannot properly any longer be drawn into question." Per Lord Ellenborough, C. J. (4 East, 288; see 3 Bos. & P. 378; 4 Per. & D. 579; infra, p. 148).

(35) Bac. Ab., *Tenure,* (F); 1 Cruise, Dig. 297.

teries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day[b]; the nature of the service being upon the reformation altered, and made conformable to the purer doctrines of the church of [102] England. It was an old Saxon tenure; and continued under the Norman revolution, through the great respect that was shewn to religion and religious men in antient times. Which is also the reason that tenants in *frankalmoign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions[c]: just as the Druids, among the antient Britons, had *omnium rerum immunitatem*[d]. And, even at present, this is a tenure of a nature very distinct from all others; being not in the least feodal, but merely spiritual. For, if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden: but merely a complaint to the ordinary or visitor to correct it[e]. Wherein it materially differs from what was called *tenure by divine service:*[36] in which the tenants were obliged to do some special divine services in certain; as, to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *free* alms; especially as for this, if unperformed, the lord might distrein, without any complaint to the visitor[f]. All such donations are indeed now out of use: for since the statute of *quia emptores*, 18 Edw. I.[37], none but the king can give lands to be holden by this tenure[g]. So that I only mention them, because *frankalmoign* is excepted by name in the statute of Charles II., and therefore subsists in many instances at this day. Which is all that shall be remarked concerning it; herewith concluding our observations on the nature of tenures.

Tenure by divine service.

[b] Bracton, l. 4, tr. 1, c. 28, § 1.
[c] Seld. Jan. 1, 42.
[d] Cæsar de Bell. Gall. l. 6, c. 13.
[e] Litt. § 136.
[f] Ibid. 137.
[g] Ibid. 140.

(36) Bac. Ab., *Tenure*, (G.)

(37) This statute enacts "that it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same of the chief lord of the same fee by *such service and customs as his feoffor held before.*"

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CHAPTER VII.

OF FREEHOLD ESTATES OF INHERITANCE.

What is an estate.

THE next objects of our disquisitions are the nature and properties of *estates*. An estate in lands, tenements, and hereditaments, signifies such interest as the tenant hath therein: so that, if a man grants all *his estate* in Dale to A. and his heirs, every thing that he can possibly grant shall pass thereby [a] [1]. It is called in Latin *status;* it signifying the condition or circumstance in which the owner stands with regard to his property. And to ascertain this with proper precision and accuracy, estates may be considered in a threefold view; first, with regard to the *quantity of interest* which the tenant has in the tenement; secondly, with regard to the *time* at which that quantity of interest is to be enjoyed; and thirdly, with regard to the *number* and *connections* of the tenants.

Division of the subject.

I. *Quantity* of interest.

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him; or it is circumscribed within a certain number of years, months, or days; or,

[a] Co. Litt. 345.

(1) In 1 Preston on Estates, 20, the term is thus defined:—"The *interest* which any one has in lands, or any other subject of property, is called his *estate*, and to this term (at least in a conveyance by deed) some adjunct or expression should be added, when the time for which the estate is to continue, as for years, for life, in tail, or in fee, or the manner in which it is to be held, as on condition, in joint-tenancy, &c., is to be described; thus, it is said, a man has an estate in fee, in tail, for life, for years, on condition, &c." Sometimes the term "*estate*" is used merely as a local description, "as all my *estate* at Ashton;" but the word "estate," when so used in a will, always carried the fee to the devisee, unless restrained by other words, though it is otherwise in a conveyance by deed. (Infra, p. 108).—[CHITTY.]

lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of estates into such as are *freehold*, and such as are *less than freehold*.

Estates are freehold, or less than freehold.

[104]

An estate of freehold, *liberum tenementum*, or frank-tenement, is defined by Britton [b] to be "the *possession* of the soil by a freeman." And St. Germyn [c] tells us, that "the possession of the land is called in the law of England the franktenement or freehold." Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, *freehold:* which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feodal investiture. And from these principles we may extract this description of a freehold: that it is such an estate in lands as is conveyed by livery of seisin; or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton [d], that, where a freehold shall pass, it behoveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates [2].

Freehold defined.

[b] C. 32. [c] Dr. & Stud. b. 2, d. 22. [d] § 59.

(2) A freehold estate seems to be any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in, or arising from, real property of free tenure; that is, now, of all which is not copyhold. And the learned Judge has elsewhere informed us, that "tithes and spiritual dues are freehold estates, whether the land out of which they issue are bond or free, being a separate and distinct inheritance from the lands themselves. And in this view they must be distinguished and excepted from other incorporeal hereditaments issuing out of land, as rents, &c., which, in general, will follow the nature of their principal, and cannot be freehold, unless the stock from which they spring be freehold also." (1 Bl. Tracts, 116).—[CHRISTIAN.]

There is some confusion here of the nature of the estate with the nature of the thing in which the estate exists, to each of which the term freehold may properly be applied, but with a very different meaning. Thus, copyholds are not freehold in respect of their tenure, being but estates at will; yet a copyholder may have an estate for life, or in fee, in them, and such estate is called an estate of freehold, and has most of the properties of an estate of freehold in freehold lands; while, in another sense, the freehold of the copyhold lands themselves is pro-

Freeholds are of inheritance, or not.

Estates of freehold (thus understood) are either estates *of inheritance,* or estates *not of inheritance.* The former are again divided into inheritances *absolute* or fee-simple; and inheritances *limited,* one species of which we usually call fee-tail.

Tenant in fee-simple.

I. Tenant in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever[e]: generally absolutely, and simply; without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (*feodum*) is the same with that of feud or fief, and, in its original sense,
[105] it is taken in contradistinction to *allodium*[f]; which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium,* and therefore is said to be seised thereof absolutely *in dominico suo,* in his own demesne. But *feodum,* or fee, is that which is held of some superior on condition of rendering him service; in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman[g] defines a feud or fee to be the right which the vassal or tenant hath in lands, to *use* the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial *propriety* of the soil always remaining in the lord. This allodial

[e] Litt. § 1. [f] See pp. 45, 47. [g] Of Feuds, c. 1.

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perly said to reside in the lord of the manor. So one speaks of a freehold estate in a mere personal rent.

The notion of a freehold estate not of inheritance, is derived from the common instance of an estate for life. In the eye of the law, (so far as the technical doctrines of real property are concerned), a life may be of indefinite duration—no number of years can be assigned beyond which the law will presume it possible that a life may not endure. Hence, an essential characteristic of a freehold estate is, that it is of uncertain and indefinite duration. If the estate is limited to determine at the end of a fixed number of years, however large, it is not a freehold, but a mere chattel. Therefore, an estate to A. for 10,000 years, if he shall live so long, is not a freehold, although an estate to A. for his life, if Saint Paul's shall so long stand, is a freehold. It is not, therefore, uncertainty merely, but also indefiniteness of duration which is essential to this kind of estate.

property no subject in England has[h]; it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king. The king, therefore, only hath *absolutum et directum dominium*[i]: but all subjects' lands are in the nature of *feodum* or fee: whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feodal clogs which were laid upon the first feudatory when it was originally granted. A subject, therefore, hath only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it[k], he hath *dominium utile*, but not *dominium directum*. And hence it is, that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have by these words: "he is seised thereof *in his demesne as of fee*." It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs for ever[3]: yet this *dominicum*, property, or demesne, is strictly not absolute or allodial, but qualified or feodal: it is his demesne, *as of fee:* that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

[106]

"Fee," its use and meaning.

This is the primary sense and acceptation of the word *fee*. But (as Sir Martin Wright very justly observes[l]) the doctrine, "that all lands are holden," having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this its primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A *fee*, therefore, in general, signifies an estate of inheritance; being the highest and most extensive

[h] Co. Litt. 1.

[i] *Praedium domini regis est directum dominium, cujus nullus est author nisi Deus.* Ibid.

[k] Co. Litt. 1.

[l] Of Ten. 148.

(3) When a man is said to be seised in his demesne, it seems rather to be intended to express that he has the actual beneficial property, and not a mere seignory or right to services. This is the well-known meaning of the term when the demesne lands of a manor are spoken of. (Ante, p. 90).

interest that a man can have in a feud: and when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it (as a fee, or a fee-simple), it is used in contradistinction to a fee conditional at the common law [4], or a fee tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man [m].

Fees corporeal and incorporeal.

Taking, therefore, *fee* for the future, unless where otherwise explained, in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments, either corporeal or incorporeal [n]. But there is this distinction between the two species of hereditaments; that, of a corporeal inheritance, a man shall be said to be seised *in his demesne as of fee:* of an incorporeal one, he shall only be said to be seised *as of fee*, and not in his demesne [o]. For as incorporeal hereditaments are in their nature collateral to, and issue out of lands and houses [p], their owner hath no property, *dominicum*, or demesne, in the *thing* itself, but hath only something, derived out of it, resembling the *servitutes*, or services, of the civil law [q],

[107]

The *dominicum* or property is frequently in one man, while the appendage or service is in another. Thus Gaius may be seised *as of fee* of a way leading over the land, of which Titius is seised *in his demesne as of fee* [5].

The fee simple generally vested,

The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other; though

[m] Co. Litt. 1.

[n] *Feodum est quod quis tenet sibi et haeredibus suis, sive sit tenementum, sive reditus, &c.* (Flet. l. 5, c. 5, § 7).

[o] Litt. § 10.

[p] See page 20.

[q] *Servitus est jus, quo res mea alterius rei vel personae servit.* Ff. 8. 1. 1.

(4) The words are by no means universally used in this sense. (See infra, p. 109, n. (12)).

(5) See the previous page, n. (3). If the word "demesne" be used to distinguish the lord's lands, which he has absolutely and fully, from the tenants', over which he has a seignory only, there is an obvious reason why it should be inapplicable to an incorporeal hereditament, of which there can be no seignory, and which cannot be held in fee by way of sub-tenancy.

divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee may be in *abeyance*, that is (as the word signifies) in expectation, remembrance, and contemplation in law; there being no person in *esse*, in whom it can vest and abide: though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres viventis:* it remains, therefore, in waiting or abeyance during the life of Richard[r] [6]. This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life; and the inheritance remains in abeyance[s]. And not only the fee, but the freehold also, may be in abeyance; as, when a parson dies, the freehold of his glebe is in abeyance until a successor be named, and then it vests in the successor[t] [7].

but may be in abeyance.

[r] Co. Litt. 342. [s] Litt. § 646. [t] Litt. § 647.

(6) The inheritance or remainder in such a case has been said to be in abeyance, or *in nubibus*, or *in gremio legis;* but Mr. Fearne, with great ability and learning, has exposed the futility of these expressions, and the erroneous ideas which have been conveyed by them. Mr. Fearne produces authorities, which prove beyond controversy, "that where a remainder of inheritance is limited in *contingency* by way of use, or by devise, the inheritance in the mean time, if not otherwise disposed of, remains in the grantor and his heirs, or in the heirs of the testator, until the contingency happens to take it out of them." (Fearne, Cont. Rem. 513, 4th edit.).

But although, as Mr. Fearne observes, "different opinions have prevailed in respect to the admission of this doctrine in conveyances at common law," (Id. 526), yet he adduces arguments and authorities, which render the doctrine as unquestionable in this case as in the two former of *uses* and *devises*. If therefore in the instance put by the learned Judge, John should determine his estate either by his death, or by a feoffment in fee, which amounts to a forfeiture, in the lifetime of Richard, under which circumstances the remainder never could vest in the heirs of Richard; in that case, the grantor or his heir may enter and resume the estate.—[CHRISTIAN.]

(7) Mr. Fearne having attacked with so much success the doctrine of abeyance, the editor may venture to observe, with respect to the two last instances, though they are collected from the text

The word "heirs" necessary in grant of fee-simple;

The word "heirs" is necessary in the grant or donation, in order to make a fee, or inheritance. For, if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life[u 8]. This very great nicety about the insertion of the word "heirs" in all feoffments and grants, in order to vest a fee, is plainly a relic of the feodal strictness; by which, we may remember[w], it
[108] was required that the form of the donation should be punctually pursued; or that, as Crag[x] expresses it in the words of Baldus, "*donationes sint stricti juris, ne quis plus donásse præsumatur quam in donatione expresserit.*" And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule is now softened by many exceptions[y].

but not in deviso by will,

For, 1. It does not extend to devises by will[9]; in

[u] Litt. § 1. [2 W. Bl. 1185].
[w] See page 56.
[x] L. 1, t. 9, § 17.
[y] Co. Litt. 9, 10.

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of Littleton, that there hardly seems any necessity to resort to abeyance, or *to the clouds*, to explain the residence of the inheritance, or of the freehold. In the first case, the whole fee-simple is conveyed to a sole corporation, the parson and his successors; but if any interest is not conveyed, it still remains, as in the former note, in the grantor and his heirs, to whom, upon the dissolution of the corporation, the estate will revert. (See vol. 1, p. 484). And in the second case, the freehold seems, in fact, from the moment of the death of the parson, to rest and abide in the successor, who is brought into view and notice by the institution and induction; for, after induction, he can recover all the rights of the church, which accrued from the death of the predecessor.—[CHRISTIAN.] See 6 Cl. & Fin. 850.

(8) Mr. Preston observes, that the word "heirs," or, in the case of a corporation, "successors," needs not be in the identical deed or grant; and therefore, where one to whom lands had been granted in fee does, after reciting the grant, or without any recital, grant the lands to another, "as fully as they were granted to him," the fee-simple will pass without any limitation to the heirs in express terms. (2 Prest. on Est. 2; Shep. Touchs. 101; Com. Dig., *Estate*, A. 2). It is the practice at this day, in conveying an estate in fee, to limit the property to the grantee, his heirs *and assigns for ever*, but these latter words are unnecessary and immaterial. (2 Preston on Est. 3).—[CHITTY.]

(9) In *wills*, a fee might have passed, without any words of limitation to the heirs, as often as it could by any means be clearly collected, that it was the intention of the testator to give an inter-

which, as they were introduced at the time when the feodal rigour was apace wearing out, a more liberal construction is allowed; and therefore by a devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But, if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life; for it does not appear that the devisor intended any more [10]. 2. Neither does this rule ex- nor in fines and recoveries,

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est of this extent. In the construction of wills, the testator is supposed to have wanted that professional assistance of which a party to a deed may always avail himself. The law, therefore, regarded the intention, more than the precise legal import of the words in which the testator had expressed his meaning, (per Lord Mansfield, Cowp. 352); and, as often as it could be collected from any circumstance in a will, or be reasonably inferred, from the whole will taken together and applied to the subject-matter, that the testator intended to pass all his estate in his property, that estate would have passed though the property were not limited to the heirs of the person to whom the devise was made. This was rather a rule of construction on the intention, than a rule of positive law. (See 2 Prest. on Estates, 69 to 77, &c.)—[CHITTY.] But the law has been altered, and now, wherever, in a will made since the year 1837, land is given without any words of limitation, the fee, or whatever other estate the testator has power over, will pass, unless a contrary intention appear on the will. (Statute 7 Will. 4 & 1 Vict. c. 26, s. 28).

(10) (See the preceding note). It was not necessary to use any words of perpetuity in a devise, in order to give a fee-simple, where it appears to be the intention of the testator to dispose of all his interest in an estate, and that was implied from the word *estate* alone; as if a testator gave to Richard his estate or *estates in* or *at* Dale, though neither heirs, assigns, nor any other word was annexed to Richard's name, yet he took an estate in fee-simple. (7 East, 259; 4 M. & S. 369; 4 Taunt. 176; 6 Id. 410; 2 Marsh. 113). So also where lands were given to Richard charged with the payment of a specific sum, and which was not to be raised out of the rents and profits, such a devise without words of perpetuity carried a fee-simple; for otherwise the devisee might have been a loser by dying before he was repaid the sum charged upon the estate. (Hargr. Co. Litt. 9. b.; 3 T. R. 356; 8 T. R. 1).

And where an estate was given generally, without words being added which would create a fee or an estate tail, and it was charged with the payment of annuities, the devisee took a fee; but that was not the case where an estate tail was given to the devisee. (5 T. R. 335). The distinction turned, in respect to carrying the fee, on this, whether the debts, &c., were merely a charge on the estate devised, or a charge on the devisee himself, in respect of such estate in his hands. (4 East, 496).

But where a testator left all his *hereditaments* to A., A. took only an estate for life. (5 T. R. 558). A fee also would not have passed by general introductory words in a will, by which

tend to fines or recoveries, considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs:" as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed[z]. 3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word "heirs;" for heirship is implied in the creation, unless it be otherwise specially provided: but, in creations by patent, which are *stricti juris*, the word "heirs" must be inserted, otherwise there is no inheritance. 4. In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for, as heirs take from the ancestor, so doth the successor from the predecessor[11]. Nay, in a grant to a bishop, or other sole spiritual corporation, in *frankalmoign*, the word "*frankalmoign*" supplies the place of "successors" (as the word "successors" supplies the place of "heirs") *ex vi termini;* and, in all these cases, a fee-simple vests in such sole corporation. But, in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted: for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be

or creations of nobility by writ,

nor in grant to corporation,

[109]

[z] Co. Litt. 9.

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the testator declared his intention to dispose of *all his estate both real and personal*, if there was not afterwards in the will some specific devise for that purpose. But where such subsequent devise was in some degree ambiguous, then the introductory words might have some effect, as indicative of the intention of the testator. (5 T. R. 13; 6 T. R. 610).—[CHRISTIAN.]

(11) In a grant of lands to a sole corporation, the word "*heirs*" will not convey a fee any more than the word "*successors*" would in a grant to a natural person. For instance, a limitation to a parson in his corporate capacity, and to his *heirs*, gives him only an estate for life. (Co. Litt. 8. b.; 4 H. 5, 9). The word *successors*, however, is not necessary to pass a fee to a sole corporation in the case of a gift in *frankalmoign*. (Co. Litt. 94. b.). But if unnecessary words be added to those which suffice to pass the fee, in grants to corporations sole, or natural persons, they may be rejected as surplusage; as if lands be granted to a bishop in his politic capacity, his *heirs* and successors, or to a man, his heirs and *successors*, the word "heirs," in the one case, and "*successors*" in the other, come within this rule. (Co. Litt. 9. a.).—[CHITTY.]

one[a]. 5. Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies[b]. But the general rule is, that the word "heirs" is necessary to create an estate of inheritance. or to the king.

II. We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications, of any sort. And these we may divide into two sorts: 1. *Qualified,* or *base* fees; and 2. Fees *conditional,* so called at the common law; and afterwards fees-*tail,* in consequence of the statute *de donis*[12]. II. Limited fees.

[a] See vol. 1, p. 484. [b] See vol. 1, p. 249.

(12) A fee-simple is often put in opposition to a fee-tail, and so includes conditional or qualified fees, which our author (copying from Bracton and others who wrote before the Statute De Donis), with more appearance than substance of accuracy, classes with fees in tail. The important distinction between a fee-simple, whether qualified or absolute, and a fee-tail, is, that the former, while it endures, descends to the heirs general, the latter to heirs special. Whether the fee is conditional or absolute may furnish another principle of classification, but not any distinction between a fee-tail and other fees, since the former as well as the latter may be subject to a qualification or condition.

The old writers, however, are not quite agreed as to their classification of estates in fee; perhaps the clearest account of them is that given by Lord Coke, in his report of *Seymour's case,* (10 Rep. 976):—"Nota, reader, every estate descendible to the heir is either an estate of inheritance or an estate of freehold; an estate of inheritance is either fee-simple or fee-tail; an estate of fee-simple is either an estate of inheritance absolute and indeterminable, as, where lands are given to a man and his heirs, he has such a pure and absolute estate which can never determine; or a fee-simple determinable, and that is in two manners, scilicet, either expressly derived out of an absolute and pure estate in fee-simple, or implicit, and derived out of an estate-tail. OUT OF an absolute estate in fee, also in two manners, first, by condition, as, upon mortgage, and that is called a fee-simple conditional; secondly, by limitation, as if A. enfeoffs B. of the manor of D., to have and to hold to him and his heirs so long as C. has heirs of his body, and that is called a fee-simple limited and qualified; and in both these cases the whole estate in the land is in the feoffee, and therefore no remainder or reversion can be expectant upon either of them [but only a right of entry by the feoffor or his heirs, when the condition is determined]: IMPLICIT, and derived out of an estate-tail, as in the case at bar, where tenant in tail bargains and sells the said messuage by deed indented and enrolled to W. H. and his heirs, and afterwards levies a fine to him and his heirs, with proclamations, he has an estate in fee-simple, as long as the tenant in tail has

1. Base fee.

1. A base, or qualified, fee is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A. and his heirs, *tenants of the manor of Dale;* in this instance, whenever the heirs of A. cease to be tenants of that manor [13], the grant is entirely defeated. So, when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle; here, John Talbot had a base or qualified fee in that dignity [c], and the instant he or his heirs quitted the seignory of this manor, the
[110] dignity was at an end. This estate is a fee, because by possibility it may endure for ever in a man and his heirs: yet, as that duration depends upon the concurrence of collateral circumstances which qualify and debase the purity of the donation, it is therefore a qualified or base fee.

2. Conditional fee.

2. A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others: "*donatio stricta et coarctata* [d]*; sicut certis hæredibus, quibusdam a successione exclusis:*" as to the heirs *of a man's body,* by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs *male of his body,* in exclusion both of collaterals, and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that, if the donee

[c] Co. Litt. 27. [d] Flet. l. 3, c. 3, § 5.

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heirs of his body, derived out of the estate-tail; and this is a more inferior and subordinate estate in fee-simple than the other two aforesaid, for upon this a remainder or reversion may be expectant, [but cannot be limited; see p. 164, n.]; and yet in all these cases he who has any such estate of inheritance may plead that he is seised of the land in his demesne as of fee, without shewing the beginning of his estate, as well when he has a fee-simple derived out of an estate-tail, as a fee-simple conditional or limited."

The term *base fee* is now generally used to designate that kind of determinable fee-simple which Lord Coke calls implicit, namely, that derived out of an estate tail by any assurance which bars the right of the issue in tail, but does not bar the right of the remainder-man or reversioner. It is used in this sense in the Act for abolishing Fines and Recoveries, 3 & 4 Will. 4, c. 74.

(13) Even for a short period, and they afterwards resume it. (Yelv. 150; Prest. on Estates, 20). But if A. die, the birth of a posthumous child will continue the tenancy and prevent the defeat of the grant. (1 Leon. 74).—[CHITTY.]

died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever; that, on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its antient proprietor [e]. Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee-simple. And we find strong traces of these limited, conditional fees, which could not be alienated from the lineage of the first purchaser, in our earliest Saxon laws [f].

To revert to the donor, if donee no heirs.

Now with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift (to a man and the heirs of his body) was a gift upon condition, that it should revert to the donor, if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue. Now we must observe, that, when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed, becomes absolute, and wholly unconditional [14]. So that as soon as the grantee had any issue born, his estate was supposed to become absolute, by the performance of the condition; at least for these three purposes: 1. To enable the tenant to aliene the land, and thereby to bar not only his own issue, but also the donor of his interest in the reversion [g]. 2. To subject him to forfeit it for treason; which he could not do, till issue born, longer than for his own life; lest thereby the

[111]

Condition, how evaded.

[e] Plowd. 241.

[f] *Si quis terram haereditariam habeat, eam non vendat a cognatis haeredibus suis, si illi viro prohibitum sit, qui eam ab initio acquisivit, ut ita facere nequeat.* LL. Aelfred. c. 37.

[g] Co. Litt. 19. 2 Inst. 233.

(14) Not wholly unconditional, but only capable of being freed from the condition by alienation or attainder, or some other circumstance; for until the nature of the estate was thus changed, it descended to the issue according to the form of the gift, and on failure of such issue reverted to the donor. Thus feme tenant in special tail, by having issue, had a full fee-simple to make the lands descendible to her issue by any other husband; for it was said, that, by the having of issue, it was a gift and disposition in law to the husband for his life, and so a sufficient alienation to alter the estate. (8 Rep. 35). And it seems that, if the issue died before alienation, the donee could not alien, unless other issue were born. (7 Rep. 62; Plowd. 235).

inheritance of the issue, and reversion of the donor, might have been defeated[h]. 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue[i]. And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious: and *his* interest seems to have been the only one which the law, as it then stood, was solicitous to protect; without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact aliene the land, the course of descent was not altered by this performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the land, by the terms of the donation, could descend to none but the heirs *of his body*, and therefore, in default of them, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee-simples took care to aliene as soon they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee-simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees: which things, says Sir Edward Coke[k], though they seem antient, are yet necessary to be known; as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such like inheritances, as are not within the statutes of entail, and therefore remain as at the common law.

[112] The inconveniences, which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse of construction, (for such it undoubtedly was), in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the second[l] (commonly called the statute *de donis conditionalibus*) to be made; which paid

Statute de donis conditionalibus.

[h] Co. Litt. 19. 2 Inst. 234. [i] Co. Litt. 19. [k] 1 Inst. 19. [l] Ibid.

a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever. This statute revived in some sort the antient feodal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor [15].

Construction of statute.

Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail*[m]; and vesting in the donor the ultimate fee-simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion[n]. And hence it is that Littleton tells us[o], that tenant in fee-tail is by virtue of the statute of Westminster the second.

All hereditaments which savour of the realty may be entailed.

Having thus shewn the *original* of estates-tail, I now proceed to consider, *what things* may, or may not, be entailed under the statute *de donis*. *Tenements* is the only word used in the statute: and this Sir Edward Coke[p] expounds

[113]

[m] The expression *fee-tail*, or *feodum talliatum*, was borrowed from the feudists, (see Crag, l. 1, t. 10, § 24, 25); among whom it signified any mutilated or truncated inheritance, from which the heirs general were *cut* off [16]; being derived from the barbarous verb *taliare*, to cut, from which the French *tailler* and the Italian *tagliare* are formed. (Spelm. Gloss. 531).

[n] 2 Inst. 335.

[o] § 13.

[p] 1 Inst. 19, 20.

(15) The words are, "That the will of the donor according to the form in his deed of gift manifestly expressed should be observed, so that they to whom a tenement was so given upon condition, should not have power of alienating the tenement so given, whereby it might not remain after their death to their issue, or to the heir of the donor if the issue should fail, whether by the want of any issue at all, or by death and failure of heirs of what issue there might have been."

It will be observed that the statute does not absolutely annul every alienation the tenant in tail may make, but merely provides that no alienation shall prevent the title of the issue in tail, and of the donor's heirs; and this distinction will be found to be important.

(16) Or is it not rather called so because it is a part *cut* out of the whole?—[CHRISTIAN.]

to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments, which savour of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as, rents, estovers, commons, and the like. Also offices and dignities which concern lands, or have relation to fixed and certain places, may be entailed [q]. But mere personal chattels, which savour not at all of the realty, cannot be entailed. Neither can an office, which merely relates to such personal chattels; nor an annuity, which charges only the person, and not the lands of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a fee-conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner [r] [17]. An estate to a man and his heirs for another's life cannot be entailed [s]: for this is strictly no estate of inheritance, (as will appear hereafter), and therefore not within the statute *de donis* [18]. Neither can a copyhold estate be entailed by virtue of the *statute;* for that would tend to encroach upon and restrain the will of the lord [19]: but, by the *special custom* of the

Personal chattels not.

Estate for life of another, not,

nor copyholds, except by custom of manor.

[q] 7 Rep. 33. [r] Co. Litt. 19, 20. [s] 2 Vern. 225.

(17) If an annuity is granted out of personal property to a man and the heirs of his body, it is a fee-conditional at common law, and there can be no remainder or further limitation of it; and when the grantee has issue, he has the full power of alienation, and of barring the possibility of its reverting to the grantor by the extinction of his issue. (2 Ves. 170; 1 Bro. 325).

But out of a term for years, or any personal chattel, except in the instance of an annuity, neither a fee-conditional nor an estate-tail can be created; for if they are granted or devised by such words as would convey an estate-tail in real property, the grantee or devisee has the entire and absolute interest without having issue; and as soon as such an interest is vested in any one, all subsequent limitations of consequence become null and void. (1 Bro. 274; Harg. Co. Litt. 20; Fearne, 345, 3rd ed.).—[CHRISTIAN.] See post, p. 398; 1 J. B. Moore, 346; 12 Ves. 225.

(18) See page 260, post.

(19) 5 B. & Al. 458. "Where an act of Parliament doth alter the service, tenure, or interest of the land or other thing, in prejudice of the lord or of the custom of the manor, or in prejudice of the tenant, there the *general words* of such act of Parliament shall not extend to copyholds; but where an act of Parliament is generally made for the good of the weal public, and no prejudice can accrue by reason of alteration of any interest, service, tenure, or custom of the manor, there many times copyhold and customary estates are within the general purview of such acts." (*Heydon's case*, 3 Rep. 8). For

manor, a copyhold may be limited to the heirs of the body[t]; for here the custom ascertains and interprets the lord's will[20].

General or special tail.

Next, as to the several *species* of estates-tail, and how they are respectively created. Estates-tail are either *general* or *special.* Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten:* which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail, *per formam doni*[u]. Tenant in tail-special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways[w]. I shall instance in only one; [114] as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten:* here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife: and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his *heirs*) give him an estate in fee: but they being heirs *to be by him begotten,* this makes it a fee-tail; and the person being also limited, on whom such heirs shall be be-

[t] 3 Rep. 8. [u] Litt. § 14, 15. [w] Litt. § 16, 26, 27, 28, 29.

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an example of copyholds being held to be included in a statute, under the general description of lands, tenements, and hereditaments, where no prejudice could ensue to the lord, see 5 B. & Ad. 131.

(20) "It is not a sufficient proof that lands have been granted in tail; for albeit lands have antiently and usually been granted by copy to many men, and to the heirs of their bodies, that may be a fee-simple conditional, as it was at the common law. But if a remainder have been limited over of such estates and enjoyed, or if the issues in tail have avoided the alienation of the ancestor, or if they have recovered the same in writs of formedon in the descender, these and such like be proofs of an estate tail." (Co. Litt. 60. b.; see 3 Dougl. 306).

In some places (as in the forest of Knaresborough), there is an express custom prohibiting entails; and even without such prohibition, copyhold lands cannot be entailed, unless there be a special custom for the purpose; and in manors where there is no such custom, a limitation to A. and the heirs of his body confers a fee-simple conditional as at common law. (5 Scott, 787). An entail in lands subject to the custom of Borough English goes to the youngest son, (2 W. Bl. 1228); and so of other customary descents. (2 B. & Ad. 95; 4 Myl. & Cr. 324).

gotten, (viz. *Mary, his present wife*), this makes it a fee-tail special.

Tail male or tail female.

Estates, in general and special tail, are farther diversified by the distinction of sexes in such entails; for both of them may either be in tail *male* or tail *female*. As, if lands be given to a man, and his *heirs male of his body begotten*, this is an estate in tail male general; but if to a man and the heirs *female of his body on his present wife begotten*, this is an estate in tail female special. And, in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor, *e converso*, the heirs male, in case of a gift in tail female[x]. Thus, if the donee in tail male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate-tail; for he cannot deduce his descent wholly by heirs male[y]. And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore, if a man hath two estates-tail, the one in tail male, the other in tail female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates; for he cannot convey his descent wholly either in the male or female line[z].

Words necessary to create a fee-tail.

As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feodal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs[a]. So, on the other hand, a gift to a man, and his *heirs male*, or *female*, is an estate in fee-simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue[b]. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man

[115]

[x] Litt. § 21, 22.
[y] Ibid. § 24.
[z] Co. Litt. 25.
[a] Co. Litt. 20. [2 W. Bl. 728].
[b] Litt. § 31. Co. Litt. 27.

and his *seed*, or to a man and his *heirs male*; or by other irregular modes of expression [c] [21].

There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates *in libero maritagio*, or *frankmarriage*. These are defined [d] to be, where tenements are given by one man to another, together with a wife [22], who is the daughter or cousin of the donor, to hold in frankmarriage. Now, by such gift, though nothing but the word *frankmarriage* is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, *frankmarriage*, does *ex vi termini* not only create an inheritance, like the word *frankalmoign*, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frankmarriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee [e] [23]. Estate in frankmarriage.

The *incidents* to a tenancy in tail, under the statute Westm. 2, are chiefly these [f]: 1. That a tenant in tail may commit *waste* on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. 2. That the wife of the tenant in tail shall have her *dower*, or thirds, of the estate-tail. 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate-tail. 4. That an estate-tail may Incidents to estates tail. [116]

[c] Co. Litt. 9. 27. [d] Litt. § 17. [e] Litt. § 19, 20. [f] Co. Litt. 224.

(21) Or to a man and his children, if he has no children at the time of the devise, (6 Co. 17); or to a man and his posterity, (1 H. Bl. 447); or by any other words, which shew an intention to restrain the inheritance to the descendants of the devisee. (See p. 381, post).—[CHRISTIAN.] See 2 Jarman on Wills, 232 et seq.

(22) But it seems the gift may be as well after marriage as before. (Dy. 147; Co. Litt. 21. b.).

(23) "And the degrees in frankmarriage shall be accounted in this manner, viz. from the donor to the donees in frankmarriage the first degree, because the wife that is one of the donees ought to be daughter, sister, or other cousin to the donor; and from the donees unto their issue shall be accounted the second degree, and so forth." (Litt. s. 20). And the reason is, that after the fourth degree the issues of the donor and donee may intermarry, (Id.); but the rule is inflexible, though sometimes the issues may intermarry before the fourth degree is past. (Harg. Co. Litt. 22. a.).

be *barred* or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir. All which will hereafter be explained at large [24].

Inconveniences of settlements.

Thus much for the nature of estates-tail: the establishment of which family law (as it is properly stiled by Pigott [g]), occasioned infinite difficulties and disputes [h]. Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then, under colour of long leases, the issue might have been virtually disinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our antient books are full: and treasons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm [i]. But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature, and therefore, by the connivance of an active and politic prince, a method was devised to evade it.

Invention of common recoveries

About two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV.; which were then openly declared by the judges to be a sufficient bar of an estate-tail [k]. For though the courts had, so long before as the reign of Edward III., very fre-

[117]

[g] Com. Recov. 5.
[h] 1 Rep. 131.
[i] Co. Litt. 19. Moor, 156. 10 Rep. 38.
[k] 1 Rep. 131. 6 Rep. 40.

(24) Estates-tail can no longer be destroyed by the means referred to in the text, but the student will nevertheless find a knowledge of the learning relating to fines, recoveries, and warranties, of essential importance, as well for the understanding of past transactions, as for the solution of questions to be decided in accordance with the existing law.

quently hinted their opinion that a bar might be effected upon these principles[l], yet it never was carried into execution, till Edward IV., observing[m] (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court[n]: wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should be an effectual destruction thereof[25]. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate-tail, must be reserved to a subsequent inquiry. At present I shall only say, that they are fictitious proceedings, introduced by a kind of *pia fraus*, to elude the statute *de donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal; and that these recoveries, however clandestinely introduced, are now become by long use and acquiescence a most common assurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements: so that no court will suffer them to be shaken or reflected on, and even acts of parliament[o] have by a side-wind countenanced and established them.

Estates-tail forfeited for treason.

This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture,

[l] 10 Rep. 37, 38.
[m] Pigott, 8.
[n] Year book, 12 Ed. IV. 14. 19. Fitzh. Abr. tit. *Faux Recov.* 20. Bro. Abr. Ibid. 30. tit. *Recov. in value*, 19. tit. *Taile*, 36.
[o] 11 Hen. VII. c. 20. 7 Hen. VIII. c. 4. 34 & 35 Hen. VIII. c. 20. 14 Eliz. c. 8. 4 & 5 Ann. c. 16. 14 Geo. II. c. 20.

(25) In *Taltarum's case* the court decided, that, under the circumstances, the entail had not been destroyed; but they founded their argument upon the assumption that a recovery properly suffered would have destroyed it.

the rapacious prince then reigning, finding them frequently
[118] resettled in a similar manner, to suit the convenience of families, had address enough to procure a statute [p], whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

May be barred by fine,

The next attack which they suffered in order of time was by the statute 32 Hen. VIII. c. 28, whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines [q], by the statute 32 Hen. VIII. c. 36, which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons claiming under such entail. This was evidently agreeable to the intention of Henry VII., whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expressly declared, that they should *not* be a bar to estates-tail. But the statute of Henry VIII., when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and

unless reversion is in king.

established that intention. Yet, in order to preserve the property of the crown from any danger of infringement, all estates-tail created by the crown, and of which the crown has the reversion, are excepted out of this statute. And the same was done with regard to common recoveries, by the statute 34 & 35 Hen. VIII. c. 20, which enacts, that no feigned recovery had against tenants in tail, where the estate
[119] was created by the crown [r], and the remainder or reversion

[p] 26 Hen. VIII. c. 13. [q] 4 Hen. VII. c. 24. [r] Co. Litt. 372.

continues still in the crown, shall be of any force and effect [26]. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative is not concerned.

Are liable for debts to the crown, or of a bankrupt.

Lastly, by a statute of the succeeding year [s], all estates-tail are rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt laws [t], they are also subjected to be sold for the debts contracted by a bankrupt [27]. And, by the construction put on the statute 43 Eliz. c. 4, an appointment [u] by tenant in tail of the lands entailed, to a charitable use, is good without fine or recovery.

Appointment to charity.

Summary.

Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at common law, after the condition was performed, by the birth of issue. For first, the tenant in tail is now enabled to aliene his lands and tenements, by fine, by recovery, or by certain other means; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the crown: secondly, he is now liable to forfeit them for high treason: and, lastly, he may charge them with reasonable leases, and also with such of his debts as are due

[s] 33 Hen. VIII. c. 39, § 75. [t] Stat. 21 Jac. I. c. 19.
[u] 2 Vern. 453. Chan. Prec. 16.

(26) The recovery in these cases did not bar the crown of its reversion, even before the statute, but only the issue in tail, so that the recoveror had a fee-simple determinable on the estate tail, and the king had his antient fee-simple in reversion also. (Plowd. 554).

(27) The clause for this purpose in the Bankrupt Act (6 Geo. 4, c. 16, s. 65) was repealed by the 55th section of the Fines and Recoveries Abolition Act, (3 & 4 Will. 4, c. 74), and other provisions were substituted, giving to the creditors the same benefit from the estate tail which the bankrupt could have had before his bankruptcy. (See ss. 56, 57, &c.). Until recently the creditors of a tenant in tail had no means of reaching the inheritance except through a bankruptcy, and that only when their debtor was a trader within the meaning of the bankrupt laws; but by the statute 1 & 2 Vict. c. 110, s. 13, a judgment or decree of a court of law or equity, establishing the creditor's right, has the effect of charging the amount to which he is entitled upon all estates-tail belonging to the debtor, as against the issue and remainder-men, so far as the debtor himself could by the proper means have barred such issue or remainder-men. (Infra, p. 161).

to the crown on specialties, or have been contracted with his fellow-subjects in a course of extensive commerce [28].

(28) For an account of the present powers of tenants in tail see the note, infra, p. 364. The remarks in the text must be understood to refer principally to the situation of a tenant in tail in possession. The powers of a tenant in tail expectant upon a preceding life estate are much more limited, as will be seen at large in the place referred to.

CHAPTER VIII.

OF FREEHOLDS, NOT OF INHERITANCE.

WE are next to discourse of such estates of freehold, as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the acts of the parties; others merely *legal*, or created by construction and operation of law [a]. We will consider them both in their order. Estates for life only.

I. Estates for life, expressly created by deed or grant, (which alone are properly conventional), are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is stiled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *pur auter vie* [b] [1]. These estates for life are, like inheritances, of a feodal nature; and were, for some time, the highest estate that any man could have in a feud which (as we have before seen [c]) was not in its original hereditary. They are given or conferred by the same feodal rights and solemnities, the same investiture or livery of seisin, as fees themselves are [2]; and they are held I. Created by deed, &c.

[a] Wright, 190. [b] Litt. § 56. [c] Page 55.

(1) Vide infra, p. 258; and as to the merger of estates pour autre vie, see p. 177.

(2) An estate for life may be created by any of the modes of assurance or conveyance proper for passing freehold estates; as, by bargain and sale operating under the statute of uses; by release from the reversioner to tenant for years; by grant of a reversion to a stranger, or, as mentioned in the text, by feoffment. In each of these conveyances words of inheritance are necessary to confer an estate of inheritance; and if no words of inheritance and nothing equivalent to them occur, the conveyance passes but an estate for the life of the grantee. The rule was formerly the same (with some qualifications) in the case of wills; but the law has been altered by the recent statute, (7 Will. 4 & 1 Vict. c. 26, s. 28), which gives to a general devise, without words of limitation, the effect of passing the whole of the testator's estate; and requires express words of restriction,

by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

[121]

Created by indefinite grant.

Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate[3]. As, if one grants to A. B. the manor of Dale, this makes him tenant for life[d]. For though, as there are no words of inheritance or *heirs* mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life *of the grantee*[e]; in case the grantor hath authority to make such a grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor[f], unless in the case of the king[4].

Determinable upon a contingency,

Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life for which they are created expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone[g]. Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life,

[d] Co. Litt. 42.
[e] Ibid.
[f] Co. Litt. 36.
[g] Co. Litt. 42. 3 Rep. 20.

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or some necessary implication, to limit this general operation. Thus, in a deed, a limitation of lands to A., without more, gives him an estate for his own life only, but a devise in a will (executed since the year 1837) to A., gives him the fee-simple.

(3) 5 B. & Cr. 228.

(4) If the grantor has not power to make a grant for the life of the grantee, the rule is different; and therefore a grant by a tenant in tail, without words of limitation, is construed to be a grant for the life of the grantor. (Co. Litt. 42. a.).

if the contingencies upon which they are to determine do not sooner happen. And, moreover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death: as if he enters into a monastery, whereby he is dead in law[h 5]: for which reason in conveyances the grant is usually made "for the term of a man's *natural* life;" which can only determine by his *natural* death[i 6].

or upon natural or civil death.

The *incidents* to an estate for life are principally the following; which are applicable not only to that species of tenants for life, which are expressly created by deed; but also to those, which are created by act and operation of law.

[122]

Incidents thereto.

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him *reasonable estovers*[k] or *botes*[l 7]. For he hath a right to the full enjoyment and use of the land, and all its profits, during his estate therein. But he is not permitted to cut down timber or do other waste upon the premises[m]: for the destruction of such things as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate; but tends to the permanent and lasting loss of the person entitled to the inheritance[8].

1. Reasonable estovers.

2. Tenant for life, or his representatives, shall not be pre-

Right to emblements.

[h] 2 Rep. 48.
[i] See vol. i. p. 132.
[k] See p. 35.
[l] Co. Litt. 41.
[m] Ibid. 53.

(5) It is scarcely necessary to say, that civil death by profession is not now recognised by the law of England. (1 Salk. 162). As to the cases of civil death which are still possible, vide ante, vol. 1, p. 132; post, vol. 4, p. 380.

(6) An estate may be granted to several for their joint lives, in which case they will have a joint estate determinable on the death of any one of them, or they may have an estate for the life of the survivor of them. (Vide infra, p. 187).

(7) An exception of timber in the lease is an exception of estovers, and the taking them is then trespass, not waste. (Vin. Ab., *Waste*, (M), pl. 26).

(8) See p. 283, post, as to waste. A tenant for life may cut timber, or dig for gravel or clay, for the purpose of repairing houses and hedges, (Co. Litt. 54. b.); but he may not sell any part of it to defray the wages of his workmen, nor can he cut timber to rebuild a house which he has allowed to go to ruin. (Vin. Ab., *Waste*, (M). See 5 Moo. & P. 645, and Hob. 234.)

judiced by any sudden determination of his estate, because such a determination is contingent and uncertain [n 8]. Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the *emblements* [9], or profits of the crop [10]: for the estate was determined by the *act of God*, and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labour and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it [11]. Wherefore, by the

[n] Co. Litt. 55.

(8) This sentence is an example of our author's tendency to lay down a rule, and to give the same thing in other words as a reason for itself. By "sudden determination" is meant a contingent and uncertain determination; and thus we are told that a contingent and uncertain determination of the estate of a tenant for life, shall not prejudice him or his representatives, "because" it is contingent and uncertain.

(9) As to emblements in general, what they are, and who shall have them, see Com. Dig., *Biens*, (G.) 1, 2; Vin. Ab., *Emblements*, and *Executors*, (U.); Bac. Ab., *Executors*, (H.) 3; Co. Litt. 55. a. b.; 1 Williams on Executors, p. 553, 3rd ed.

With respect to the person who is entitled to emblements, Lord Ellenborough observed, in 8 East, 343, that the distinction between the heir and devisee in this respect is capricious enough. In the testator himself, the standing corn, though part of the realty, subsists for some purposes, as a chattel interest, which goes on his death to his executors, as against the heir; though, as against the executors, it goes to the devisee of the land, who is in the place of the heir, unless otherwise directed. This is founded upon a presumed intention of the devisor in favour of the devisee. But this again may be rebutted by words which shew an intent that the executor shall have it. A devise to the executor of all the testator's *stock* on the farm, entitles him to the crops, in opposition to the devisee of the estate. (6 East, 604, n. (*d*); 8 Id. 339; Com. Dig., *Biens*, (G. 2)). The executor's claim is good against the heir of a tenant in tail, (Com. Dig., *Biens*, (G. 2)); but not against a dowress or a surviving joint-tenant. (Id.; Owen, 102; Dyer, 316 a).

It has been held, that if a devise be to A. for life, remainder to B., and before severance A. dies, B. shall have them, (Cro. Eliz. 61; Win. 51; Godb. 159); and that if a devise be to A. for life, who dies before severance, he in reversion shall have them; but the contrary is established, and that the executor of the tenant for life shall have them, it being for the benefit of the kingdom, which is interested in the continual produce of corn, and will not suffer them to go to the remainderman. (3 Atk. 16).—[CHITTY.]

(10) And may enter and carry them away. (Co Litt. 56. a.).

(11) If therefore the person whose

feodal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year; but if he died between the beginning of March and the end of August, the heirs of the tenant received the whole [o]. From hence our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and *cestuy que vie,* or he on whose life the land is held, dies after the corn sown, the tenant *pur auter vie* shall have the emblements [12]. The same is also the rule, if a life-estate be determined by the *act of law.* Therefore, if a lease be made to husband and wife during coverture, (which gives them a determinable estate for life), and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii,* the husband shall have the emblements in this case; for the sentence of divorce is the act of law [p]. But if an estate for life be determined by the tenant's *own act,* (as, by forfeiture for waste committed; or, if a tenant during widowhood thinks proper to marry), in these, and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements [q 13]. The doctrine of emblements extends not only to corn sown, but to roots planted [14], or other annual artificial

[123]

None, if estate determine by tenant's own act.

What are emblements.

[o] Feud. l. 2, t. 28. [p] 5 Rep. 116. [q] Co. Litt. 55.

estate determines has not himself been at the expense of the tillage and sowing, the rule does not necessarily apply; as, where A., having sown land, grants it to B. for life, remainder to C., and B. dies before the crop is severed, C. shall have the crop and not B.'s executor. (Hob. 178; Vin. Ab., *Emblements,* (A).) But if a testator, having sown the land, devise it to A. for life, without any remainder over, and both the testator and A. die before the crop is severed, the executors of A. shall have the crop, (Winch, 51; Co. Litt. 55. b.); but if there had been a remainder over, the remainder-man would have been entitled. The ground of this distinction may be collected from the preceding note. From a dictum in Hob. 132, it would appear that the rule is different in respect of a grant inter vivos; and that there, if the ultimate remainder-man die before severance, the grantor's executors are entitled to the crops sown by such grantor.

(12) The rule applies to any uncertain estate or interest; as, for instance, to an estate for years, determinable with a life, (Gilb. Ev. 215), or to an estate at will, determined by the lessor, or by the death of the lessee. (Co. Litt. 55. b.).

(13) See *Davies* v. *Eyton,* 4 Moo. & P. 820, 7 Bingh. 154.

(14) The commentator has Lord

profits, but it is otherwise of fruit-trees, grass, and the like; which are not planted annually at the expense and labour of the tenant, but are either a permanent, or natural profit of the earth [r]. For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants. The advantages also of emblements are particularly extended to the parochial clergy by the statute 28 Hen. VIII. c. 11 [15]. For all persons, who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation [16].

[r] Co. Litt. 55, 56. 1 Roll. Abr. 728.

Coke's authority for ranking annual roots among emblements, and this appears to be the better opinion; but both Godolphin, (pt. 2, c. 14, s. 1), and Wentworth, (p. 152), assert that carrots, turnips, and other annual roots belong to the heir, because the executor is not at liberty to break the soil to reach them. In *Evans* v. *Roberts*, (5 B. & Cr. 832), Bayley, J., founded his judgment on the assumption that potatoes were emblements. Artichokes, it is clear, not being a strictly annual produce, are not emblements. (Wentw. Off. Ex. 63).

(15) That statute enables an incumbent to bequeath, by will, the corn and grain growing upon the glebeland, manured and sown at his own cost, (s. 6). But a parson who resigns his living is not entitled to emblements, although his tenant in such case would be entitled to them, (2 B. & Al. 470); and by the stat. of Merton, 20 Hen. 3, c. 2, the executors of a tenant in dower are entitled to emblements,—an enactment which, according to the better opinion, was merely in affirmance of the common law. (Com. Dig., *Biens*, (G. 2)). If the dowress marry, and her husband sow the land and die, his executors, and not the widow, are entitled to the crop; but it is otherwise if the land had been sown before marriage. (Bro. Ab., *Emblements*, pl. 26).

(16) Emblements are such crops as, in the ordinary course of things, return the labour and expense bestowed upon them strictly within the year. Thus, if a tenant plant hops, he will not be entitled to the first crop unless produced within the year; but as hops will not bear without labour annually bestowed in manuring, making of hills and setting of poles, the tenant is entitled to the year's crop, although it proceed from antient roots. (Cro. Car. 515; 2 Freem. 210; Co. Litt. 55. b.). On the other hand, as fruit trees will bear, although no labour is bestowed upon them within the year, the tenant is not entitled to the fruit as emblements. And where the tenant had sown clover with barley in the spring, according to a practice by which the benefit of the clover would not be realised within the year, it was held that he could not claim any advantage that accrued after the expiration of a year from the time of sowing. (2 Nev. & M. 725; 5 B. & Ad. 120).

Corn, peas, beans, tares, hemp, flax, saffron, melons, and, according to the

3. A third incident to estates for life relates to the under-tenants, or lessees. For they have the same, nay greater indulgences than their lessors, the original tenants for life. The same; for the law of estovers and emblements, with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place [s]: and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate;* her taking husband is her own act, and therefore deprives her of the emblements: but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her [t] [17]. The lessees of tenants for life had also at the common law another most unreasonable advantage; for, at the death of

3. Right of sub-lessee to emblements.

[124]

Apportionment of rent.

[s] Co. Litt. 55. [t] Cro. Eliz. 461. 1 Roll. Abr. 727.

better opinion, annual roots, such as potatoes, &c., are emblements. Grass is not, even when it arises from seed, (Com. Dig., *Biens*, (G. 1)); but the artificial grasses, such as sanfoin, clover, &c., which are annually renewed like any other crop, seem to fall within the description of emblements. (2 Nev. & M. 725; Burn, Ecc. L. 297). Lord Coke, in his commentary on the Statute of Merton, says, "*Blada* signifieth corn or grain while it groweth, or grain while it is in herbâ, dum seges in herbâ; but it is taken for all manner of corn or grain, or things annual, coming by the industry of man, as hemp, flax, &c." (2nd Inst. 81). The word "emblement" comes from *embler* or *emblaver*, to sow with corn, whence the old law phrase, to *emble* land, or sow it for an annual crop.

Emblements are considered for most purposes as goods and chattels; they go, as has been seen, to the executors, they may be taken in execution under a fieri facias, and contracts relating to them have been held not to be contracts relating to any interest in land within the Statute of Frauds, (29 Car. 2, c. 3, s. 4), in contradistinction to contracts relating to growing grass, crops of fruit, &c. (2 Brod. & B. 368; 5 B. & Cr. 829; 8 Dowl. & Ry. 611; 4 Mee. & W. 343). A dictum in Fitzh. Abr., *Feffement*, pl. 59, that at common law emblements cannot be granted without deed, if not overruled by these cases, must be rested on the ground that a *grant*, as distinguished from a contract for sale, includes the right of ingress, egress, and regress, which is an easement. The landlord could not distrain emblements until that power was given him by the statute 11 Geo. 2, c. 19. (1 Roll. Ab., 666; 8 Taunt. 431, 742).

As to the law of fixtures, which bears some resemblance to that of emblements, vide infra, p. 281.

(17) The dictum in *Oland's case*, (5 Rep. 116 a), contra, is opposed by all the authorities. (See S. C., Cro. El. 460; Gouldsb. 189; 1 Roll. Ab. 727; 2 B. & Al. 470).

their lessors, the tenants for life, these under-tenants might, if they pleased, quit the premises, and pay no rent to any body for the occupation of the land since the last quarter day, or other day assigned for payment of rent [u]. To remedy which it is now enacted [v], that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent, from the last day of payment to the death of such lessor [18].

II. Estate tail after possibility of issue extinct.

II. The next estate for life is of the legal kind, as contradistinguished from conventional; *viz.* that of tenant *in tail after possibility of issue extinct.* This happens where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct: in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As, where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue [w]: in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely
[125] *tenant in fee-tail special,* that would not have distinguished him from others; and besides, he has no longer an estate of inheritance, or fee [x], for he can have no heirs capable of taking *per formam doni.* Had it called him *tenant in tail without issue,* this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been stiled *tenant in tail without possibility of issue,* this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition, therefore, could so exactly mark him out, as this of tenant *in tail after possibility of issue extinct,* which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail, which he once had, but also states that this possibility is now extinguished and gone.

[u] 10 Rep. 127.
[v] Stat. 11 Geo. II. c. 19, § 15.
[w] Litt. § 32.
[x] 1 Roll. Rep. 184. 11 Rep. 80.

(18) Vide ante, p. 43.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it [19]. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them [y]. A possibility of issue is always supposed to exist in law, unless extinguished by the death of the parties: even though the donees be each of them an hundred years old [z]. How created.

This estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail; as not to be punishable for waste, &c.[a] [20]: or, he is tenant in tail, with many of the restrictions of a tenant for life; as, to forfeit his estate, if he alienes it in fee-simple [b]: whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner: who is not concerned in interest, till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature [21]. Its privileges. [126]

[y] Co. Litt. 28.
[z] Litt. § 34. Co. Litt. 28.
[a] Co. Litt. 27.
[b] Ibid. 28.

(19) And if the tenant in tail after possibility &c. convey his estate away, in the hands of his alienee it is but an ordinary life estate, without any peculiar privileges. (3 Leon. 341).

(20) This tenant, being dispunishable for waste, may not only commit ordinary waste, but also convert to his own use the property wasted. A court of equity, however, will restrain him from committing malicious waste, and, if it is committed, it would seem (as in the case of ornamental trees), the property wasted will go to the first person living who has an estate of inheritance. This appears to be the only way to reconcile the authorities on the subject, some of which maintain that the property belongs to the tenant, others say it must go to the reversioner. (See Har. Co. Litt. 27. b. and 218. b. n. 2; 2 P. Wms. 241; 2 Freem. 278; 12 East, 221; 15 Ves. 430; Bisset on Estates for Life, pp. 20 et seq.).—[CHITTY.]

(21) This estate cannot by any act of the tenant be enlarged into a fee-simple. (3 & 4 Will. 4, c. 74).

III. Tenant by the curtesy.

III. Tenant *by the curtesy of England,* is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements [22] in fee-simple or fee-tail; and has by her issue, born alive, which was capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England [c 23].

This estate, according to Littleton, has its denomination, because it is used within the realm of England only; and it is said in the Mirrour [d] to have been introduced by King Henry the First; but it appears also to have been the established law of Scotland, wherein it was called *curialitas* [e], so that probably our word *curtesy* was understood to signify rather an attendance upon the lord's *court* or *curtis,* (that is, being his vassal or tenant), than to denote any peculiar favour belonging to this island [24]. And therefore it is laid down [f] that, by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands alone: whereas, before issue had, they must both have done it together. It is likewise used in Ireland, by virtue of an

[c] Litt. § 35, 52.
[d] C. 1, § 3.
[e] Crag. l. 2, c. 19, § 4.
[f] Litt. § 90. Co. Litt. 30, 67.

(22) See a reference to some old instances of curtesy of titles and offices of honour, Co. Litt. 29. a. Mr. Hargrave says, "I cannot learn that there have been any claims of dignities by curtesy since Lord Coke's time; and from the want of modern instances of such claims, and from some late creations, by which women have been made peeresses in order that the families of their husbands might have titles, and yet the husbands themselves continue commoners, it seems as if the prevailing notion was against curtesy in titles of honour. However, I have not yet discovered whether this great question has ever formally received the judgment of the House of Lords."

There is no curtesy of a copyhold, unless by special custom. (Vin. Ab. (E), pl. 4). Curtesy of gavelkind lands is of a moiety only, and is forfeited by marriage. (Rob. Gav. b. 2, c. 1).

(23) The tenant by the curtesy holds of the superior lord, and not of the heir. (8 Rep. 36 a). To the above definition it must be added, that the wife's seisin must be a sole seisin in possession, and not in remainder or reversion expectant on a freehold estate, and that the seisin may be at any time during the coverture. (Co. Litt. 29. a., 183. a.).

(24) I should rather think with Mr. Wooddeson, that this estate took its name from its peculiarity to England: and that it was afterwards introduced into Scotland and Ireland. (2 Woodd. 18). Tenant by the *curtesy* of England, perhaps, originally signified nothing more than tenant by the *courts* of England; as in Latin he is called *tenens per legem Angliæ.* (See Stat. pro Tenentibus per Legem Angliæ, App. to Ruff. 29).—[CHRISTIAN.]

ordinance of King Henry III[g]. It also appears[h] to have obtained in Normandy; and was likewise used among the antient Almains or Germans[i]. And yet it is not generally apprehended to have been a consequence of feodal tenure[k], though I think some substantial feodal reasons may be given for its introduction. For, if a woman seised of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to maintain it; for which [127] reason the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee, during the life of such tenant[l]. As soon, therefore, as any child was born, the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy *initiate;* and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

Four requisites to curtesy.

There are four requisites necessary to make a tenancy by the curtesy; marriage, seisin[25] of the wife, issue, and death of the wife[m]. 1. The marriage must be canonical and legal. 1. Legal marriage. 2. The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed[26]. 2. Seisin of wife. And therefore a man shall not be tenant by the cur-

[g] Pat. 11 H. III. m. 30, in 2 Bac. Abr. 659.
[h] Grand Coustum. c. 119.
[i] Lindenbrog. LL. Alman. t. 92.
[k] Wright, 194.
[l] F. N. B. 143.
[m] Co. Litt. 30.

(25) This should be, sole seisin, for the husband of a joint-tenant cannot claim curtesy against the survivor.

(26) 2 Saund. 45, n. (5). Courts of equity, however, allow curtesy of *trusts* and of other interests, which, although mere *rights* in law, are deemed *estates* in equity. (1 Atk. 603; 1 P. W. 108; 2 Vern. 536; 1 Ves. 174; 2 Jac. & W. 194). And a mere limitation to the wife's separate use will not exclude the husband's title. (5 Madd. 408). Lord Redesdale, in 2 Sch. & Lef. 388, suggests as a reason for the distinction between dower and this claim, that parties had been acting on this supposition, that the creation of trust-estates would bar dower; and that it was necessary for the security of purchasers, mortgagees, and other persons taking the legal estate, to depart in cases of dower from the general principle of courts of equity, which is, in acting upon trusts, to follow the law; but it was not necessary in cases of tenancy by the curtesy, because no such practice had prevailed. (And see Lord

tesy of a remainder or reversion [27]. But of some incorporeal hereditaments a man may be tenant by the curtesy though there have been no actual seisin of the wife; as, in case of an advowson, where the church has not become void in the life-time of the wife: which a man may hold by the curtesy, because it is impossible ever to have actual seisin of it, and *impotentia excusat legem* [n 28]. If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands; for the king by prerogative is entitled to them, the instant she herself has any title: and since she could never be rightfully seised of the lands, and the husband's title depends entirely upon her seisin, the husband can have no title as tenant by the curtesy [o 29].

3. Issue inheritable born alive.

3. The issue must be born alive. Some have had a notion that it must be heard to cry; but that is a mistake. Crying indeed is the *strongest* evidence of its being born alive; but it is not the *only* evidence [p]. The issue also must be born during the life of the mother; for if the mother dies in labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by
[128] the curtesy: because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb; and the estate being once so vested, shall not afterwards be taken from him [q 30]. In gavelkind lands,

[n] Co. Litt. 29.
[o] Co. Litt. 30. Plowd. 263.
[p] Dyer, 25. 8 Rep. 34.
[q] Co. Litt. 29.

Talbot's observations in *Att.-Gen.* v. *Lockley*, Sugd. Vend. App. No. 19).

Entry is not always necessary to an actual seisin or seisin in deed; for, if the land be in lease for years, curtesy may be without entry or even receipt of rent, the possession of the lessee being the possession of the husband and wife. (Co. Litt. 29. a.; 8 Rep. 96 a; 3 Atk. 469; infra, p. 209).

(27) See 2 Saund. 382 a, b.

(28) This is only true of an advowson in gross; for if an advowson be appendant to a manor, and the wife die before entry into the manor, the husband shall not be tenant by the curtesy of the advowson. (Hal. MSS.).

(29) See this doubted in Harg. Co. Litt. 30. b. n. 2. It is, however, a conclusive argument in favour of the position in the text, that an idiot cannot be married. (Vide infra, p. 130).

(30) For a similar reason there can be no curtesy of a joint estate of inheritance. (Co. Litt. 183. a.; 2 Roll. Ab. 90; 9 Mod. 150).

a husband may be tenant by the curtesy without having any issue[r 31]. But in general there must be issue born: and such issue as is also capable of inheriting the mother's estate[s]. Therefore, if a woman be tenant in tail *male*, and hath only a *daughter* born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tale male[t]. And this seems to be the principal reason, why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised, because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife: but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seised; and therefore, as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy[u 32]. And hence we may observe, with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture; for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy[w]. The husband by the birth of the child becomes (as was before observed) tenant by the curtesy *initiate*[x], and may do many acts to charge the lands, but his estate is not *consummate* till the death of the wife: which is the fourth and last requisite to make a complete tenant by the curtesy[y 33].

Tenant by the curtesy initiate.

4th, Death of wife.

[r] Co. Litt. 30. [s] Litt. § 56. [t] Co. Litt. 29. [u] Ibid. 40. [w] Ibid. 29. [x] Ibid. 30. [y] Ibid.

(31) But a tenant by curtesy of gavelkind lands has only a moiety of the wife's estate, which he loses by a second marriage. (Robin. Gavelk. b. 2, c. 1).—[CHRISTIAN.]

(32) A descent does not now depend upon the seisin of the last owner; and this principal reason, why there can be no curtesy of an estate of which the wife was not actually seised, no longer exists. But the rule, it is presumed, remains unaffected.

(33) If the child which the husband has by his wife be *capable*, and have a

IV. Estate in dower.

IV. Tenant in *dower* is where the husband of a woman is seised of an estate of inheritance, and dies[34]; in this case, the wife shall have the third[35] part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life[z].

Its origin.

Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos:* which among the Romans signified the marriage portion, which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance: nor indeed

[z] Litt. § 36.

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mere possibility of inheriting, the husband shall be tenant by the curtesy. Thus, if a woman seised in fee of lands marry and have a son, after which the husband dies, and she marries again and has a child by the second husband, here the husband shall be tenant by the curtesy, although there is but a mere possibility that the child which the wife had by her second husband should ever inherit the estate, the child by her first husband being alive. (Prest. Est. 516).—[CHITTY.]

If a man take a wife seised of lands in fee, and have issue, and afterwards the wife is attainted of felony, so that the issue cannot inherit to her, yet he shall be tenant by the curtesy, in respect of the issue which he had before the felony, and which by possibility might then have inherited. But if the attainder had preceded the birth of issue, it had been otherwise. (Co. Litt. 40. a. See 2 Sim. 249).

The curtesy is a continuation of the wife's estate of freehold, and though the inheritance of the wife ceases on her death by virtue of a condition in the limitation, the husband shall have his curtesy if his title was initiate in the wife's lifetime. (10 J. B. Moore, 235, n.; 2 Sim. 249).

(34) The banishment of the husband by abjuration, or by act of Parliament, being a civil death, was held to entitle the wife to her dower immediately; but if a man became civilly dead by profession, it gave her no avail, without whose consent he could not have entered into religion, and therefore his wife, after such civil death, was not dowable until his natural death. (Co. Litt. 132. b.).

(35) But of gavelkind lands, a woman is endowed of a moiety while she remains chaste and unmarried. (Co. Litt. 33. b.; Rob. Gavelk. 159). And the widow is entitled for her dower to the whole of her husband's lands held by the tenure of Borough-English. But of copyhold lands a woman is endowed (if at all) only of such lands whereof her husband was seised at the time of his death. (2 Atk. 525; 2 Ves. sen. 633; Cowp. 481). And her title to dower or free-bench is governed by the custom; according to its authority she may take a moiety, or three parts, or the whole, or even less than a third, but it must be found precisely as it is pleaded. (Cro. Eliz. 15; 1 Gale & Dav. 180; 1 Q. B. Rep. 682). A custom entitling widows of tenants in fee-simple to free-bench, implies that the widows of tenants in tail shall have the same right. (3 Dougl. 303).

is there anything in general more different, than the regulation of landed property according to the English and Roman laws. Dower out of lands seems also to have been unknown in the early part of our Saxon constitution; for, in the laws of King Edmund[a], the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one half of the lands with a proviso that she remained chaste and unmarried[b]; as is usual also in copyhold dowers, or free-bench. Yet some[c] have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feodal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens tertia*[d] and *dotalitium*) by the Emperor Frederick the Second[e]; who was contemporary with our king Henry III. It is possible, therefore, that it might be with us the relic of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals[f]. However this be, the reason which our law gives for adopting it is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children[g].

[130]

In treating of this estate, let us, first, consider *who* may be endowed; secondly, of *what* she may be endowed; thirdly, the manner *how* she shall be endowed; and fourthly, how dower may be *barred* or prevented.

1. Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos*[h]. But a divorce *a mensa et thoro* only doth not destroy the dower[i]; no, not even for adultery itself by the common law[k]. Yet now by the

1. Who may be endowed.

Dower, how lost.

[a] Wilk. 75.
[b] Somner. Gavelk. 51. Co. Litt. 33. Bro. *Dower*, 70.
[c] Wright, 192.
[d] Crag. l. 2, t. 22, § 9.
[e] Ibid.
[f] Mod. Un. Hist. xxxii. 91.
[g] Bract. l. 2, c. 39. Co. Litt. 30.
[h] Bract. l. 2, c. 39, § 4.
[i] Co. Litt. 32.
[k] [3 P. W. 276; 3 Moo. & P. 408]. Yet, among the ancient Goths, an adul-

statute Westm. 2[l], if a woman voluntary leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her[36]. It was formerly held, that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy[m]: but, as it seems to be at present agreed, upon principles of sound sense and reason, that an idiot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place[37]. By the antient law the wife of a person attainted of treason or felony could not be endowed; to the intent, says Staunforde[n], that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may; though Britton[o] gives it another turn: *viz.* that it is presumed the wife was privy to her husband's crime. However, the statute 1 Edw. VI.
[131]* c. 12, abated the rigour of the common law in this particular, and allowed the wife her dower. But a subsequent statute[p] revived this severity against the widows of traitors, who are now barred of their dower (except in the case of certain modern treasons relating to the coin[q]), but not the widows of felons[38]. An alien also cannot be endowed[39],

teress was punished by the loss of her *dotalitii et trientis ex bonis mobilibus viri.* (Stiernh. l. 3, c. 2).

[l] 13 Edw. I. c. 34.

[m] Co. Litt. 31.

[n] P. C. b. 3, c. 33.

[o] C. 110.

[p] 5 & 6 Edw. VI. c. 11.

[q] Stat. 5 Eliz. c. 11; 18 Eliz. c. 1; 8 & 9 W. III. c. 26; 15 & 16 Geo. II. c. 28.

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(36) And in a case where John de Camoys had assigned his wife, by deed, to Sir William Paynel, knight, which Lord Coke calls *concessio mirabilis et inaudita*, it was decided in Parliament, a few years after the statute was enacted, notwithstanding the purgation of the adultery in the spiritual court, that the wife was not entitled to dower. (2 Inst. 435). This is an indictable offence, being a great public misdemeanor. (See Vol. 4, p. 64, n.)—[CHRISTIAN.] See 3 Moo. & P. 399.

(37) Ante, 1 Vol. 438; stat. 15 Geo. 2, c. 30.

(38) Stat. 54 Geo. 3, c. 145.

(39) Lord Hale's MSS. contain the following note upon this subject:—"*Nota.* Anciently, a woman alien was not dowable; but by special act of Parliament not printed, (Rot. Parl. 8 Hen. V. n. 15), all women aliens, who from thenceforth should be married to Englishmen by licence of the king, are enabled to demand their dower after the death of their husbands, to whom they should in time to come be married, in the same manner as English women." According to lord Coke, an infidel, the wife of a Christian, shall not be en-

unless she be queen consort; for no alien is capable of holding lands [r]. The wife must be above nine years old at her husband's death, otherwise she shall not be endowed [s]: though in Bracton's time the age was indefinite, and dower was then only due *si uxor possit dotem promereri, et virum sustinere* [t]. At what age.

2. We are next to inquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements [40], of which her husband was seised [41] in fee-simple, or fee-tail, at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir [u 42]. Therefore, if a man, seised in fee-simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a 2. Of what widow may be endowed.

[r] Co. Litt. 31. [s] Litt. § 36. [t] L. 2, c. 9, § 3. [u] Litt. § 36, 53.

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dowed; and the case which he mentions as authority for this is, of a Jew in England who married a Jewess, and was afterwards converted to the Christian faith, and died; the wife brought a writ of dower, but was held to be barred. (Co. Litt. 31. b).—[CHITTY].

(40) See Co. Litt. 31. b.; 2 Ves. jun. 652; 1 Taunt. 402.

(41) This should be "solely seised;" for if the husband hold in joint-tenancy, and die before his co-tenant, the title of the latter, in consequence of the seisin which he had of the *whole* of the estate during the husband's lifetime, is better than that of the wife. (Co. Litt. 37). Another requisite omitted in the text is, that the estate of inheritance should be in possession, and not in remainder or reversion expectant on a particular estate of freehold.

If the inheritance of the husband is expectant upon a term of years, then, as the freehold is in possession, (p. 168, n.), the wife is dowable, subject to the term, (1 Taunt. 410), and may have her third of any rent reserved.

But the legislature, having put the dower of a woman married since the 1st of January, 1834, completely within the power of the husband, has thought fit to enlarge the list of subjects to which such dower may attach, by abolishing the necessity of seisin in the husband, and of any legal estate whatever, so that his beneficial interest amount to a sole equitable estate of inheritance in possession. (Stat. 3 & 4 Will. 4, c. 105).

(42) As to the question whether the wife's issue could possibly have inherited, see 2 Atk. 47; 3 Bos. & P. 652; 2 Sim. 249.

second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have could by any possibility inherit them[v]. A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed[w] [43]. The seisin of
[132] the husband, for a transitory instant only, when the same
Momentary seisin of husband. act which gives him the estate conveys it also out of him again, (as where by a fine land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower[x]: for the land was merely *in transitu*, and never rested in the husband; the grant and render being one continued act. But, if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof[y] [44]. And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under

[v] Litt. § 53.

[w] Co. Litt. 31.

[x] Cro. Jac. 615. 2 Rep. 77. Co. Litt. 31.

[y] This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seised of an estate in fee by survivorship, in consequence of which seisin his widow had a verdict for her dower. (Cro. Eliz. 503).

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(43) Where entry is requisite to perfect a common-law assurance, as in the case of an exchange or a partition between joint-tenants, the wife's title does not attach before entry. (Perk. s. 368).

(44) "The student may reasonably be puzzled to distinguish between the transitory instant of one example, and the single moment of the other. In fact, the space of time is no essential ingredient in the case; it is the *interest* of the husband."—[COLERIDGE.] The distinction in the text, however, namely, that where the estate vests in the husband but for an instant, and that *from the necessity of the case, and for the purpose of conveyance only*, the dower shall not attach, seems to contain a sounder explanation; for, at common law, the notions of *property* and of *estate* are identical. Thus, if one joint-tenant make a feoffment in fee, his wife shall not be endowed. (Co. Litt. 31. b.). Yet here the husband has an interest in the momentary fee he passes; but, as he acquires it only for the purpose of conveyance, it shall not be subject to dower.

the restrictions before mentioned; unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a castle, built for defence of the realm[z]: nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked[a]. Copyhold estates are also not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free-bench[b] [45]. But where dower is allowable, it matters not though the husband aliene the lands during the coverture; for he alienes them liable to dower[c] [46].

3. Manner in which endowed.

3. Next, as to the manner in which a woman is to be endowed. There are now subsisting four species of dower; the fifth, mentioned by Littleton[d], *de la plus belle*, having been abolished together with the military tenures, of which it was a consequence. 1. Dower by the *common law;* or that which is before described. 2. Dower by particular *custom*[e]; as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. 3. Dower *ad ostium ecclesiæ*[f]: which is where tenant in fee

[z] Co. Litt. 31. 3 Lev. 401.
[a] Co. Litt. 32. 1 Jon. 315.
[b] 4 Rep. 22.
[c] Co. Litt. 32.
[d] § 48, 49.
[e] Litt. § 37.
[f] Ibid. § 39.

(45) The nature and extent of the dower varies in different manors, according to the custom. (See Watkins on Copyholds, and Scriven, 86). In the absence of any special custom, the widow is entitled to free-bench out of those copyholds only of which the husband died seised; in other words, her title is liable to be barred by her husband's simple alienation of the lands. (*Wood* v. *English*, 5 Jurist, 741; 2 Ves. sen. 633; 1 Gale & D. 180; ante, p. 129, n. 35).

(46) It is now settled, that, although the husband may be tenant by the curtesy of a trust-estate of inheritance, the wife is not entitled to dower out of such an estate. (3 P. Wms. 229; 2 Atk. 525). The reason assigned why the wife has not dower out of a trust estate is, that she was not endowed of a use at common law. And from analogy to trusts, it has been determined, that a wife shall not be endowed of an equity of redemption, where the estate was mortgaged in fee by the husband previous to the marriage. (1 Bro. 326.)—[CHRISTIAN.] (4 Beav. 10). And where the husband is seised of a legal estate in trust for others, equity will restrain the wife from enforcing her legal title. (2 Ves. sen. 634). But by a modern statute a widow may now be endowed of a trust estate. (Ante, p. 131, n. 41).

simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (Sir Edward Coke, in his translation of Littleton, adds) troth plighted between them, doth endow his wife with the whole, or such quantity as he shall please, of his lands; at the same time specifying and ascertaining the same; on which the wife, after her husband's death, may enter without farther ceremony. 4. Dower *ex assensu patris*[g]; which is only a species of dower *ad ostium ecclesiæ*, made when the husband's father is alive, and the son, by his consent expressly given, endows his wife with parcel of his father's lands. In either of these cases, they must (to prevent frauds) be made[h] *in facie ecclesiæ et ad ostium ecclesiæ; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina fuere conjugia.*

Revolutions in doctrine of dower.

It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind, before mentioned; *viz.* a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry I., this condition of widowhood and chastity was only required in case the husband left any issue[i]: and afterwards we hear no more of it. Under Henry the Second, according to Glanvil[k], the dower *ad ostium ecclesiæ* was the most usual species of dower; and here, as well as in Normandy[l], it was binding upon the wife, if by her consented to at the time of marriage. Neither, in those days of feodal rigour, was the husband allowed to endow her *ad ostium ecclesiæ* with more than the third part of the lands whereof he then was seised, though he might endow her with less: lest by such liberal endowments the lord should be defrauded of his wardships and other feodal profits[m]. But if no specific dotation was made at the church porch, then she was endowed *by the common law* of the third part (which was called her *dos rationabilis*) of such lands and tenements, as

[134]

If not endowed specifically, then by common law.

[g] Litt. § 40.

[h] Bracton, l. 2, c. 39, § 4.

[i] *Si mortuo viro uxor ejus remanserit, et sine liberis fuerit, dotem suam habebit;—si vero uxor cum liberis remanserit, dotem quidem habebit, dum corpus suum legitime servaverit.* (Cart. Hen. I. A.D. 1001. Introd. to great charter, edit. Oxon. pag. iv.)

[k] Glanv. l. 6, c. 1 & 2.

[l] Gr. Coustum. c. 101.

[m] Bract. l. 2, c. 39, § 6.

the husband was seised of at the time of the espousals, and no other; unless he specially engaged before the priest to endow her of his future acquisitions[n]: and if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower[o] in lands which he afterwards acquired[p]. In King John's *magna carta*, and the first charter of Henry III.[q], no mention is made of any alteration of the common law, in respect of the lands subject to dower: but in those of 1217, and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his life-time[r]: yet, in case of a specific endowment of less *ad ostium ecclesiæ*, the widow had still no power to waive it after her husband's death. And this continued to be law, during the reigns of Henry III. and Edward I.[s] In Henry IV.'s time it was denied to be law, that a woman can be endowed of her husband's goods and chattels[t]: and, under Edward IV., Littleton lays it down expressly, that [135] a woman may be endowed *ad ostium ecclesiæ* with more than a third part[u]; and shall have her election, after her husband's death, to accept such dower or refuse it, and betake

[n] *De questu suo.* (Glan. ib.)—*de terris acquisitis et acquirendis.* (Bract. ib.).

[o] Glanv. l. 6, c. 2.

[p] When special endowments were made *ad ostium ecclesiæ*, the husband, after affiance made and troth plighted, used to declare with what specific lands he meant to endow his wife (*quod dotat eam de tali manerio cum pertinentiis, &c.* Bract. ibid.), and therefore, in the old York ritual (Seld. Ux. Hebr. l. 2, c. 27), there is, at this part of the matrimonial service, the following rubric: "*sacerdos interroget dotem mulieris; et, si terra ei in dotem detur, tunc dicatur Psalmus iste, &c.*" When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali, de omnibus terris et tenementis;* Bract. ib.), the husband seems to have said, "with all my lands and tenements I thee endow;" and then they all became liable to her dower. When he endowed her with personalty only, he used to say, "with all my worldly goods (or, as the Salisbury ritual has it, *with all my worldly chattel*) I thee endow;" which entitled the wife to her thirds, or *pars rationabilis*, of his personal estate, which is provided for by Magna Carta, cap. 26, and will be farther treated of in the concluding chapter of this book; though the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty.

[q] A. D. 1216, c. 7, edit. Oxon.

[r] *Assignetur autem ei pro dote suâ tertia pars totius terræ mariti sui quæ sua fuit in vita suâ, nisi de minori dotata fuerit ad ostium ecclesiæ.* c. 7. (Ibid.)

[s] Bract. ubi supr. Britton, c. 101, 102. Flet. l. 5, c. 23, §§ 11, 12.

[t] P. 7 Hen. IV. 13, 14.

[u] § 39. F. N. B. 150.

herself to her dower at common law[w]. Which state of uncertainty was probably the reason, that these specific dowers, *ad ostium ecclesiæ* and *ex assensu patris*, have since fallen into total disuse[47].

Common-law endowments.

I proceed, therefore, to consider the method of endowment, or assigning dower by the common law, which is now the only usual species. By the old law, grounded on the feodal exactions, a woman could not be endowed without a fine paid to the lord; neither could she marry again without his licence; lest she should contract herself, and so convey part of the feud to the lord's enemy[x]. This licence the lords took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But to remedy these oppressions, it was provided, first by the charter of Henry I.[y], and afterwards by *magna carta*[z], that the widow shall pay nothing for her marriage[48], nor shall be distrained to marry afresh, if she chooses to live without a husband, but shall not, however, marry against the consent of the lord; and farther, that nothing shall be taken for assignment of the widow's dower, but that she shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's *quarentine;* a term made use of in law to signify the number of forty days, whether applied to this occasion, or any other[a]. The particular lands, to be held in dower, must be assigned[b] by the heir of the husband, or his guardian; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this
[136] entry becomes tenant thereof to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation,

[w] § 41.
[x] Mirr. c. 1, § 3.
[y] Ubi supra.
[z] Cap. 7.
[a] It signifies, in particular, the forty days, which persons coming from infected countries are obliged to wait, before they are permitted to land in England.
[b] Co. Litt. 34, 35.

(47) And have since been abolished. (Stat. 3 & 4 Will. 4, c. 105, s. 13).

(48) See a note on this passage, by Mr. Justice Coleridge, in which it is contended that the word *maritagium*, here translated marriage, was used in the ordinary sense of that word for the portion or estate given to a husband with a wife, i. e. in *frankmarriage*.

or under tenancy completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarentine, or do assign it unfairly, she has her remedy at law and the sheriff is appointed to assign it[c]. Or if the heir (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by writ of *admeasurement* of dower[d]. If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but if it be indivisible, she must be endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like[e 48].

If heir neglects, sheriff assigns dower.

Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for the claim of the wife to her dower at the common law diffusing itself so extensively, it became a great clog to alienations, and was otherwise inconvenient to families. Wherefore, since the alteration of the antient law respecting dower *ad ostium ecclesiæ*, which hath occasioned the entire disuse of that species of dower, jointures have been introduced in their stead, as a bar to the claim at common law. Which leads me to enquire, lastly,

Jointure generally substituted for dower.

4. How dower may be *barred* or prevented[49]. A widow

Dower, how barred.

[c] Co. Litt. 34, 35.
[d] F. N. B. 148. Finch, L. 314. Stat. Westm. 2, 13 Edw. I. c. 7.
[e] Co. Litt. 32.

(48) See 1 Gale & D. 180.

(49) As the widow was dowable of every legal estate of inheritance of which the husband was solely seised in possession at any time during the coverture, to which her issue might possibly inherit, the title to dower formed a serious impediment to the conveyance of the estates of married men; and hence it became usual, upon purchasing an estate of inheritance, to take the conveyance in such a form as would prevent the right of dower from attaching. Various modes were formerly in use for this purpose. Sometimes the estate was conveyed to a trustee for the purchaser, in which case the purchaser's wife was not dowable, because her husband's estate was not legal, and the trustee's wife would have been restrained by a court of equity, if she had attempted to enforce her legal title; but this method was objectionable on account of the danger and inconvenience of leaving the legal estate in a third person. Another method was, to take the conveyance to the purchaser and another person as joint tenants, in trust, as to

may be barred of her dower not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before mentioned [50], but also by detaining the title deeds, or evidences of the estate from the heir, until she restores them [f]: and, by the statute of Gloucester [g], if a dow-

[f] Co. Litt. 39.

[g] 6 Edw. I. c. 7.

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the estate of the stranger, for the purchaser; but this plan was open to nearly the same objections as the former, and this further danger, that, by the death of the third person in the purchaser's lifetime, the estate of the latter, becoming a sole estate, would become liable to dower. Another method was therefore contrived, (by the celebrated Fearne), which was free from all objections; the inheritance was limited to the husband by way of *remainder* in the following manner:— It was limited to the husband during his natural life, with remainder to A. B., in trust for the husband, (an estate which, as will be seen when the subject of remainders comes to be considered, was a vested estate in remainder, capable of taking effect in case the husband's estate should by forfeiture or otherwise come to an end during his life, and sufficient to separate the husband's life estate from the remainder in fee, and to keep them from uniting, (18 Viner, 413)), with remainder to the husband in fee. Under these limitations, as the husband could never have an estate of inheritance in possession during his life, the widow's title to dower was effectually prevented from arising, (see 3 Lev. 437), while the small (and in effect fictitious) estate vested in A. B. caused no inconvenience. The last improvement was given to this contrivance by investing the purchaser with a power, under the statute of uses, of appointing the fee-simple in any manner he should please; the mode of effecting which will be explained hereafter, (vide p. 339), and under which power it was held that the wife's dower might be effectually defeated. (5 B. & Al. 561).

The form of limitations to prevent dower thus brought to perfection is still in common use, being necessary in all cases where the purchaser was married to his present wife on or before the 1st January, 1834, and being useful even where such was not the case, for the purpose of satisfying future purchasers without going into evidence of the fact. But the title to dower of a widow married subsequently to that day now forms no impediment to alienation, it having been enacted, that such a widow shall not be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will; that all partial dispositions, debts, incumbrances, contracts, and engagements to which his land shall be subject, shall be good against her dower; that her dower may be barred by a simple declaration in any deed executed by the husband or by his will; that it may be subjected to any restrictions by his will; and, finally, that unless a contrary intention is declared by the will, a devise by the husband of any estate or interest in land out of which she would be entitled to dower, to or for the benefit of his widow, shall bar her dower. (Stat. 3 & 4 Will. 4, c. 105).

(50) By the custom of Kent, the wife's dower of the moiety of gavelkind lands was in no case forfeitable for the felony of the husband, but where the heir should lose his inheritance. (Noy's Max. 28). But this custom does not extend to treason. (Wright's Tenures, 118; Rob. Gavelk. 292).—[CHITTY.]

ager alienes the land assigned her for dower, she forfeits it *ipso facto*, and the heir may recover it by action[51]. A [137] woman also may be barred of her dower, by levying a fine, or suffering a recovery of the lands, during her coverture[h]. But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII. c. 10.

A jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke[i]: "a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least." This description is framed from the purview of the statute 27 Hen. VIII. c. 10, before mentioned, commonly called the statute of *uses*, of which we shall speak fully hereafter. At present I have only to observe, that before the making of that statute, the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man, and the *use*, or profits thereof, in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the *use* of lands in absolute fee-simple, yet the wife was not entitled to any dower therein: he not being *seised* thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy, or Jointure.

[h] Pig. of Recov. 66.

[i] 1 Inst. 36.

(51) "The mischief, before the making of this statute (Gloucester, c. 7), was not where a gift or feoffment was made in fee or for term of life (of a stranger) by tenant in dower; for, in that case, he in the reversion might enter for the forfeiture, and avoid the estate. But the mischief was, that when the feoffee, or any other, died seised, whereby the entry of him in the reversion was taken away, he in the reversion could have no writ of entry *ad communem legem* until after the decease of tenant in dower, and then the warranty contained in her deed barred him in the reversion if he were her heir, as commonly he was; and for the remedy of this mischief this statute gave the writ of entry *in casu proviso* in the lifetime of tenant in dower." (2 Inst. 309). But the statute was not intended to restrain tenant in dower from aliening for *her own life*, for alienation for such an estate wrought no wrong. (Ibid.)—[CHITTY.]

jointure: which settlement would be a provision for the wife in case she survived her husband. At length the statute of uses ordained, that such has had the *use* of lands should, to all intents and purposes, be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure: had not the same
[138] statute provided that upon making such an estate in jointure to the wife before marriage, she shall be for ever precluded from her dower[k]. But then these four requisites must be punctually observed: 1. The jointure must take effect[52] immediately on the death of the husband. 2. It must be for her own life at least, and not *pur auter vie,* or for any term of years, or other smaller estate[53]. 3. It must be made to herself, and no other in trust for her[54]. 4. It must be made, and so in the deed particularly expressed to be[55], in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiæ,* and may either accept it or refuse it, and betake herself to her dower at common law; for she was not capable of consenting to it during coverture[56]. And if, by any fraud or accident, a jointure

Four requisites to jointure.

[k] 4 Rep. 1, 2.

(52) It must not only take effect in fact, but it must be limited so to take effect. (Co. Litt. 36).

(53) Although the estate must be in point of quantity for her life, yet it may be such as may be determined sooner by her own act. Thus, an estate *durante viduitate* is a good jointure, because unless sooner determined by herself, it continues to her for life. (4 Rep. 3).—[CHITTY.]

(54) Any equitable estate may be a good jointure in equity. (4 Ves. 395, Ibid. 4; 1 Swanst. 446; 5 Russ. 255).

(55) Or it may be averred to be. (4 Rep. 3). An assurance was made to a woman, to the intent it should be for her jointure, but it was not so expressed in the deed. And the opinion of the court was, that it might be averred that it was for a jointure, and that such averment was traversable. (Owen, 33).—[CHRISTIAN.] Since the Statute of Frauds, however, which requires the surrender of any estate in land, and any agreement concerning land, to be in writing, such averment would not be admissible, even in equity. (3 Atk. 8).

(56) See 3 Myl. & Cr. 171; 1 Scott, 82. And where a devise is expressed to be given in lieu and satis-

made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law[1] [57].

There are some advantages attending tenants in dower that do not extend to jointresses; and so, *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law is subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the king's debtor, the king cannot distrein for his debt; if contracted during the coverture[m]. But, on the other hand, a widow may enter at [139]

Comparative advantages of dower and jointure.

[1] These settlements, previous to marriage, seem to have been in use among the ancient Germans, and their kindred nation the Gauls. Of the former Tacitus gives us this account: "*Dotem non uxor marito, sed uxori maritus affert; intersunt parentes et propinqui, et munera probant.*" (De Mor. Germ. c. 18). And Cæsar (de Bello Gallico, l. 6, c. 18) has given us the terms of a marriage settlement among the Gauls, as nicely calculated as any modern jointure: "*Viri, quantas pecunias ab uxoribus dotis nomine acceperunt, tantas ex suis bonis, æstimatione factâ, cum dotibus communicant. Hujus omnis pecuniæ conjunctim ratio habetur, fructusque servantur. Uter eorum vita superavit, ad eum pars utriusque cum fructibus superiorum temporum pervenit.*" The dauphin's commentator on Cæsar supposes that this Gaulish custom was the ground of the new regulations made by Justinian (Nov. 97) with regard to the provision for widows among the Romans; but surely there is as much reason to suppose, that it gave the hint for our statutable jointures.

[m] Co. Litt. 31. a. F. N. B. 150.

faction of dower, or where that is the clear and manifest intention of the testator, the wife shall not have both, but shall have her choice. (Harg. Co. Litt. 36. b.).

But where the lands are devised out of which the widow is entitled to dower, and the testator leaves her an annuity, she shall not be put to her election, unless it appears to have been the intention of the testator that she should not retain both.

Lord Eldon has declared, that "the question in all these cases is, whether the testator meant to give away his wife's dower; which he could not do directly. For that it must be seen clearly, that he meant to dispose so that, if she should claim dower, it would disappoint the will. It must appear there is a repugnancy." (6 Ves. 616).—[CHRISTIAN.]

(57) But if the wife was of age when she married, it seems that she will be restrained by a court of equity from enforcing her legal claim to dower, in case of eviction from her jointure. (1 Madd. 609). It has been determined, that if a woman, who is under age at the time of marriage, agrees to a jointure and settlement in bar of her dower, and her distributive share of her husband's personal property, in case he dies intestate, she cannot afterwards waive it; but is as much bound, as if she were of age at the time of marriage. Lord Northington had decreed the contrary; but his decree was upon both points reversed. (4 Br.

once, without any formal process, on her jointure land; as she also might have done on dower *ad ostium ecclesiæ*, which a jointure in many points resembles; and the resemblance was still greater, while that species of dower continued in its primitive state: whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower [n]. And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow [o]. Wherefore Sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow, that even dower *ad ostium ecclesiæ*, the most eligible species of any [58].

[n] Co. Litt. 36. [o] Ibid. 37.

P. C. 570; 2 Eden, 73).—[CHRISTIAN.] And in 3 Ves. jun. 545, it was held, that dower was barred by a settlement, previous to marriage, but during the infancy of the wife, of stock and leasehold property, partly the husband's and partly the wife's, though no guardian consented. A jointure, to be binding in equity upon an infant, must be limited to take effect with certainty immediately upon the husband's death. (4 Br. C. C. 500; 5 Ves. 189. See 5 Russ. 255).

(58) A jointure is not forfeited by the adultery of the wife, as dower is; and the Court of Chancery will decree against the husband a performance of marriage articles, though he alleges and proves that his wife lives separate from him in adultery. (3 Cox's P. Wms. 277).—[CHRISTIAN.] (2 B. & C. 547). But by express stipulation, jointure and separate maintenance may be forfeited by any prohibited intercourse with a third person. (1 Taunt. 417).

CHAPTER IX.

OF ESTATES LESS THAN FREEHOLD.

Three sorts.

OF estates that are less than freehold, there are three sorts; 1. Estates for years; 2. Estates at will; 3. Estates by sufferance.

I. For years.

I. An estate for *years*[1] is a contract for the possession of lands or tenements, for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee[a], and the lessee enters thereon[b]. If the lease be put for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is stiled so in some legal proceedings: a year being the shortest term which the law in this case takes notice of[c]. And this may, not improperly, lead us into a short digression, concerning the division and calculation of time by the English law[2].

[a] We may here remark, once for all, that the terminations of "—or" and "—ee" obtain, in law, the one an active, the other a passive signification; the former usually denoting the doer of any act, the latter him to whom it is done. The feoffor is he that maketh a feoffment; the feoffee is he to whom it is made: the donor is one that giveth lands in tail; the donee is he who receiveth it: he that granteth a lease is denominated the lessor; and he to whom it is granted the lessee. (Litt. § 57).

[b] Ibid. 58.

[c] Ibid. 67.

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(1) On this subject the student is recommended to study the admirable article on "Leases and terms for years," printed in Bacon's Abridgment, and attributed to the pen of Chief Baron Gilbert.

(2) The new or Roman style was in general use in every part of the continent (except Russia and Greece) long before its adoption in England, where, previously to the year 1752, the year commenced on the 25th March, and the Julian kalendar was used. The *new style* was introduced here, by the statute 24 Geo. 2, c. 23, which enacts, that the 1st January shall be reckoned to be the first day of the year, and throws out eleven days in that year from 2nd September to the 14th, and in other respects regulates the future computation of time, with a

Division and computation of time in general.

The space of a year is a determinate and well-known period, consisting commonly of 365 days: for though in

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saving of ancient customs, &c. See the statute set forth in Burn, Ecc. L. tit. *Kalendar*.

The *year* consists of three hundred and sixty-five days; there are six hours, within a few minutes, over in each year, which every fourth year make another day, being the 29th February, and these three hundred and sixty-six days constitute the bissextile or leap-year. (Co. Lit. 135; 2 Roll. 521, l. 35; Com. Dig., *Ann.* (A.); 24 Geo. 2, c. 23, s. 2).

Half-a-year consists of one hundred and eighty-two days, for there shall be no regard to a part or a fraction of a day. (Co. Litt. 135. b.; Cro. Jac. 166). The time to collate within six months shall be reckoned half-a-year, or one hundred and eighty-two days, and not lunar months. (Cro. Jac. 166; 6 Co. 61).

So a *quarter of a year* consists but of ninety-one days, for the law does not regard the six hours afterwards. (Co. Litt. 135. b.; 2 Roll. 521, l. 40; Com. Dig., *Ann.* (A.)).

But both half-years and quarters are usually divided according to certain feasts or holidays, rather than a precise division of days, as Lady-day, Midsummer-day, Michaelmas-day, and Christmas; or Old Lady-day (6th April), or Old Michaelmas-day (the 11th October). In these cases, such division of the year by the parties is regarded by the law, and therefore, though half-a year's notice to quit is necessary to determine a tenancy from year to year, yet a notice served on the 29th September to quit on 25th March, being half-a-year's notice according to the above division, is good, though there be less than one hundred and eighty two, viz. one hundred and seventy-eight days. (4 Esp. 5, 198; 6 Esp. 53; 4 Moo. & P. 391).

A *day* is natural, which consists of twenty-four hours; or artificial, which contains the time from the rising of the sun to the setting. (Co. Litt. 135. a.). A day is usually intended of a natural day, as in an indictment for burglary we say, in the night of the same day. (Co. Litt. 135. a.; 2 Inst. 318). Sometimes days are calculated exclusively, as where an act required ten clear days' notice of the intention to appeal, it was held, that the ten days are to be taken exclusively both of the day of serving the notice and the day of holding the sessions. (3 B. & Al. 581). A legal act, done at any part of the day, will in general relate to the first period of that day. (11 East, 498).

An *hour* consists of sixty minutes. (Com. Dig., *Ann.* (C.)). By a misprint, in 2 Inst. 318, it is stated to be forty minutes. There is a distinction in law as to the certainty of stating a month or day, and an hour. When a fact took place, "*circa horam*" is sufficient; but not so as to a day, which must be stated with precision, though it may be varied from in proof. (2 Inst. 318).—[CHITTY.]

In the computation of time, "the law doth reject all fractions and divisions of a day, for the uncertainty, which is always the mother of confusion and contention." (5 Rep. 2; Co. Litt. 135; 15 Ves. 257; 11 East, 496; 5 Mad. 61). In computing the years of the reign of Edw. I., who was proclaimed king on the 20th November, 1272, however, this maxim was disregarded. Thus the surrender of the Scottish crown by Baliol in the early part of the 20th November, 1292, was said to have taken place at the end of the 20 Edw. I.; while proceedings, later in the same day, were said to have happened "anno regni ipsius domini nostri Edwardi vicesimo finiente et vicesimo primo incipiente." (Sir H. Nicolas, Chronology of History, p. 312). When it is neces-

bissextile or leap years it consists properly of 366, yet by the statute 21 Hen. III. the increasing day in the leap year, together with the preceding day, shall be accounted for one day only. That of a month is more ambiguous: there being, in common use, two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year: or, as calendar months of unequal lengths, according to the Julian Month.

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sary to ascertain which of two events first happened; the courts will regard fractions of a day; (3 Burr. 1434; 2 B. & Al. 586; 1 Ves. sen. 83; 8 Dowl. P. C. 337; 2 Mont. & Ayr. 13); and in questions of seisin, &c., even a moment may be divided into two parts; *but not into three.* (6 Rep. 33).

It was formerly held, that where an act was agreed to be done within a certain number of days, "from the date" of the instrument, the day of the date was to be included in the computation; but not when the words were "from the day of the date;" but since the case of *Pugh* v. *The Duke of Leeds*, Cowp. 714, these formal distinctions have been done away. (2 Camp. 294; 1 Per. & D. 647). And when the computation is to be made from an *act done*, it was formerly said that the day in which the act is done is included in the reckoning, (3 T. R. 623; 3 East, 407); but, however, this doctrine has been overruled. The presentment of a bill of exchange is an act done; yet it is now settled that the day of presentment is to be excluded. (9 B. & Cr. 603). The execution of a deed is an act done; yet the twenty days from the execution of an annuity deed were counted, under the old annuity act, exclusively of the day of execution. (5 T. R. 283). "It is not necessary to lay down any general rule upon this subject; but upon technical reasoning, I should rather think it would be more easy to maintain, that the day of an act done or an event happening ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point, so that any act done in the compass of it is no more referrible to any one than to any other portion of it; but the act and the day are co-extensive; and therefore, the act cannot properly be said to be passed until the day is passed. But it is not necessary to lay down any general rule. Whichever way it should be laid down, cases would occur, the reason of which would require exceptions to be made." (Per Sir W. Grant, M. R., 15 Ves. 257). Upon this reasoning, and upon consideration of the effect of applying a contrary rule to the extreme case of a single day, it appears to be settled, that the day on which the act is to be done from which the period is to be computed, must be excluded from the computation. (6 Mee. & W. 49; 12 Ad. & El. 635; 11 Sim. 434; 1 Curteis, 1). And where a person has a certain time from an act done to deliberate, upon the expiration of which another person may do some act, the period is in general to be calculated exclusively of the days in which both the precedent and the subsequent acts are done. (Id.; 8 Ad. & E. 173; 12 Id. 472. But see 1 Phill. 103).

Where property was directed to be transferred to a party on her attaining her twenty-fifth year, it was held that the time had arrived when she became twenty-four years old. (4 You. & C. 256).

division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks[3]. Therefore a lease for "twelve months" is only for forty-eight weeks; but if it be for "*a* twelvemonth" in the singular number, it is good for the whole year [d]. For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases: it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution. In the space of a day, all the twenty-four hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes [e]. Therefore, if I am bound to pay money on any certain day, I

[d] 6 Rep. 61. [e] Co. Litt. 135.

(3) A month in law is always a lunar month, except in quare impedit; in all temporal cases the word month standing unexplained means a lunar month, in ecclesiastical cases a calendar month. (1 W. Bl. 450; 1 Bingh. 310).

"I confess, I wish it had been decided, that months should be understood to mean calendar and not lunar months; but the contrary has been determined so long and so frequently, that it ought not again to be brought in question. In the instance indeed of a quare impedit, the computation of time is by calendar months, but that depends on the words of an act of Parliament, (13 Edw. 1, *st.* 1, c. 5), tempus semestre. (See Cro. Jac. 167). But for all other purposes, and in all acts of Parliament where months are spoken of without the word "calendar," and nothing is added from which a clear inference can be drawn that the legislature intended calendar months, it is understood to mean lunar months." Per Lord Kenyon, (6 T. R. 226). This rule is applied in the construction of deeds and contracts, in which the word month standing unexplained is held to mean four weeks. (See, however, 1 You. & C. 419). But the court may gather evidence of a different intention from the context, as where on a sale it was agreed, that certain acts were to be done at the expiration of two, three, and four months from the date of the contract, which was the 24th January, and the sale was to be completed on the 24th of June following, which day being exactly five calendar months from the date of contract, was held to shew that the parties contemplated calendar months in the prior limitations of two, three, and four months. (1 Mau. & S. 111; see 3 Br. & B. 186; 1 Q. B. Rep. 247; 1 You. & C. 401). And by the custom of merchants, the word "month" in a bill of exchange or a policy of insurance, is always understood to be a calendar month, (3 Br. & B. 187); and generally in mercantile contracts, it seems that the word will have that construction. (1 Q. B. Rep. 250).

discharge the obligation if I pay it before twelve o'clock at night; after which the following day commences[4]. But to return to estates for years.

These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords, but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price than as having any property of their own. And therefore they were not allowed to have a freehold estate; but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the antient law, be at any time defeated by a common recovery suffered by the tenant of the freehold[f]; which annihilated all leases for years then subsisting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

Origin of terms for years.

[142]

While estates for years were thus precarious, it is no wonder that they were usually very short, like our modern leases upon rack rent; and indeed we are told[g] that by the antient law no leases for more than forty years were allowable, because any longer possession (especially when given without any livery declaring the nature and duration of the estate) might tend to defeat the inheritance. Yet this law, if

Terms were usually short.

[f] Co. Litt. 46. [g] Mirror, c. 2, § 27. Co. Litt. 45, 46.

(4) See 4 T. R. 170; where there was a difference of opinion in the court upon the question, whether a bill of exchange could be protested for non-payment on the same day that it was due, or the acceptor had the whole of the day to discharge it in. It is now settled, that refusal to pay on demand made within business hours, is a *primâ facie* dishonour of a bill of exchange; but that, notwithstanding, the acceptor has the whole day to pay in. (19 Ves. 217; 3 Camp. 194; 1 Car. & P. 556). The holder of a bill payable at a banker's must present it within banking hours, or take the risk of there being no one at the office, (7 East, 385; 1 Cr., M. & R. 744); and in other cases, the presentment must be within a reasonable time; and 8 or 9 o'clock in the evening has been held reasonable. (2 B. & Ad. 188).

ever it existed, was soon antiquated; for we may observe in Madox's collection of antient instruments, some leases for years of a pretty early date, which considerably exceed that period [h]: and long terms, for three hundred years or a thousand, were certainly in use in the time of Edward III. [i], and probably of Edward I. [k]. But certainly, when by the statute 51 Hen. VIII. c. 15, the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, to the same rules of succession, and with the same inferiority to freeholds, as when they were little better than tenancies at the will of the landlord.

[143]

Must be certain in duration.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined: for every such estate must have a certain beginning, and certain end [l] [5]. But *id certum est, quod certum reddi potest:* therefore, if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years [m]; for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease [n] [6]. A lease for so many years as J. S. shall live, is void from the beginning [o]; for it is

[h] Madox Formulare Anglican. n°. 239, fol. 140. Demise for eighty years, 21 Ric. II. . . . . Ibid. n°. 245, fol. 146, for the like term, A. D. 1429. . . . . Ibid. n°. 248, fol. 148, for fifty years, 7 Edw. IV.

[i] 32 Ass. pl. 6. Bro. Abr. t. *Mordauncestor*, 42, *Spoliation*, 6.

[k] Stat. of Mortmain, 7 Edw. I.

[l] Co. Litt. 45.

[m] 6 Rep. 35.

[n] Co. Litt. 46.

[o] Ibid. 45.

(5) See 8 Car. & P. 302.

(6) If an impossible time is mentioned for the commencement of the term, the date of the delivery of the lease is taken; but if an uncertain time, as, the month without the year, is specified, the lease is void. (Co. Litt. 46; 6 Rep. 35; Burr. 1190).

neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good[p]: for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S., or his ceasing to be parson there[7].

May commence in futuro.

We have before remarked, and endeavoured to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even if it be *pur auter vie*, is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate[q]. Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*; because it cannot be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter[r 8]. And, because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *pos-*

[144]

But no estate of freehold can.

Interesse termini.

[p] Co. Litt. 45. [q] Ibid. 46. [r] 5 Rep. 94.

(7) As to what is an estate for a term certain, see 10 Mee. & W. 670.

(8) That is to say, no estate of freehold can be limited at common law to commence in futuro, unless at the same time an estate of freehold in possession is created to support it, as will be explained when remainders come to be treated of; but it will be seen under the head of uses, that this common law rule may be evaded by means of a conveyance operating under the Statute of Uses.

sessed, not properly of the land, but of the term of years[s]; the possession or seisin of the *land* remaining still in him who hath the freehold[9]. Thus the word, *term,* does not

Difference between *term* and *time.*

[s] Co. Litt. 46.

(9) See 5 B. & Cr. 111; 1 Mee. & W. 747; 1 Br. & B. 248. "To many purposes he is not tenant for years until he enter; as a release made to him is not good to increase his estate before entry, but he may release the rent reserved before entry, in respect of the privity." (See Co. Litt. 270. a.) "Neither can the lessor grant away the reversion by the name of the reversion before entry. But the lessee before entry hath an interest, *interesse termini,* grantable to another. And albeit the lessor die before the lessee enter, yet the lessee may enter into the lands. And so, if the lessee dieth before he enter, yet his executors or administrators may enter, because he presently by the lease hath an interest in him, and if it be made to two, and one die before entry, his interest shall survive." (Co. Litt. 46. b.). And the lessee, as he may assign, so before entry he may underlease to another, and the entry of his underlessee will be equivalent to an entry by himself. (Id.; 2 Q. B. Rep. 156). "At common law no lease for years, whether it were with or without any reservation of rent, was looked upon to be complete till an actual entry by the lessee, for though the lessor had done all on his part to perfect the contract, so that he could not afterwards any way derogate from or avoid it, yet till there was a transmutation of the possession by the actual entry of the lessee, it wanted the chief mark and indication of his consent thereto, without which it might be unreasonable to adjudge him in actual possession to all intents and purposes, since it might so happen that such lease was made in his absence, and when he knew nothing of it, and perhaps might be greater than he was willing to take, or the estate might be so incumbered as to bring a load upon him rather than any advantage. For these reasons, (amongst others) the law would not cast the immediate and actual possession upon him, nolens volens, and therefore it was, that till actual entry he could not maintain an action of trespass or ejectment, because those actions complaining of an immediate violation of the possession could not be proper for him who had no actual possession. But the lessor having done all that was requisite on his part to divest himself of the possession, and pass it over to the lessee, had thereby transferred such an interest to the lessee as he might at any time reduce into possession by an actual entry, as well after the death of the lessor as before; and such an interest as he might before entry grant over to another, or if he died before entry would go to his executors, or, if the grant were made to two jointly, to the survivor and his executors, any of whom might enter at their pleasure, and so reduce the contract into an actual execution; for it was perfect and complete on the lessor's part, and the perfecting of it on the lessee's part was entirely in his own power, and left to his own discretion to use when and as he thought fit." (Bac. Abr. *Leases,* (M). See 1 Moo. & Sc. 199). It must not, however, be supposed that any indication of acceptance on the part of the lessee (such as the signing of the lease, &c.) is sufficient to vest the estate in him at common law; this conclusion, however reasonable, would be contrary to the well-known rule that actual entry by the tenant is essential to give him a complete estate for years in possession. (Co. Litt. 270. a.).

merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire, during the continuance of the *time;* as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A. for the term of three years, and after the expiration of the said *term* to B. for six years, and A. surrenders or forfeits his lease at the end of *one* year, B.'s interest shall immediately take effect: but if the remainder had been to B. from and after the expiration of the said *three years,* or from and after the expiration of the said *time,* in this case B.'s interest will not commence till the time is fully elapsed, whatever may become of A.'s term [t] [10].

[t] Co. Litt. 45.

(10) There are some points respecting leases from year to year, or for other recurring periods, which deserve attention. Independently of any local custom, the law presumes that a tenancy at a rent, whether payable annually, half-yearly, or quarterly, (4 Taunt. 131), the duration of which is not defined by express agreement, is a tenancy from year to year, that is to say, a tenancy which, until determined by notice or surrender, is impliedly renewed at the commencement of each year, and which may be made to cease on any anniversary of the day on which it commenced, by half a year's notice given by either party. (7 T. R. 85; 3 T. R. 13; 1 Per. & D. 618; 12 Ad. & El. 476; 10 Mee. & W. 494). Thus, if A. on the 1st of August enters into the occupation of land belonging to B., and on or after the 1st of November pays £10 to B. as a quarter's rent up to November, these facts alone are primâ facie evidence (2 Nev. & M. 838) of a contract for a yearly tenancy; and this tenancy continues until either party gives to the other at least six months' notice that "on the next 1st of August," or generally, "at the expiration of the current year," the tenancy is to determine. A notice to quit on any other day, or a notice to quit not given in time, is ineffectual. (W. Bl. 596; 3 Camp. 509). But there may be an agreement that a quarter's notice, or a month's notice, shall be sufficient, though even this will not authorize a notice to quit on any other day than the anniversary of the commencement of the tenancy, unless an intention to that effect is clearly indicated. (1 Per. & D. 454).

The general rule may be varied by custom. (Harg. Co. Litt. 270. b.) By the custom of London, a quarter's notice is sufficient where the rent is under 40*s.* (Skin. 449). In the case of lodgings let by the week, a week's notice is not requisite, and the tenant may leave at the expiration of any week; but if he commence a new week he must pay rent for the whole of that week. (7 Car. & P. 56). But when lodgings are let by the month or by the quarter, it seems that, after the expiration of the first month or quarter, a month's or a quarter's notice must be given; though, if the lodger take the apartment for a certain specified period, he may leave at the expiration of that period without any notice. (Id. See 2 Scott, N. R. 637).

If either party waive the notice, (which the tenant will do if he keep possession beyond the expiration of the year, though this may be explained, (6 Nev. & M. 428), and which the

Tenant for years has estovers;

Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers which we formerly observed [u] that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote [w]; terms which have been already explained [x].

[145]

And emblements in some cases.

With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of [y]. But where the lease for years depends upon an uncertainty: as, upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife; or if the term of years be determinable upon a life or lives; in all these cases the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be

[u] Page 122. [w] Co. Litt. 53. [x] Page 35. [y] Litt. § 68.

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landlord will do if he receive rent for a subsequent period, or otherwise acknowledge the tenancy to be subsisting), it goes on as before, until determined by a fresh notice duly acted upon. And if a tenant for a term certain keep the possession after the expiration of the term, and pay rent, that constitutes a tenancy from year to year, on the terms (as to repairs, length of notice to quit, &c.) contained in the expired lease. (11 East, 312; 4 Camp. 275; 6 Nev. & M. 106).

A lease for years, without more, is a lease for two years. (6 Rep. 35). A lease "for one year and so on from year to year until the tenancy hereby created shall be determined as hereafter mentioned," followed by a proviso that either party might determine the tenancy by giving three months' notice, was held to be a lease for two years certain, on account of the rule already mentioned, that a tenancy from year to year can only be put an end to on the expiration of the current year, unless there be an express stipulation to the contrary. (1 Per. & Dav. 454). So, a letting from one half-year and so on from half-year to half-year until determined, is a letting for a year certain. (4 Nev. & P. 525). So, a lease for three years, and after for three years, and so from three years to three years, is a lease for nine years certain. (Bac. Ab., *Leases*, (L.) 3).

entitled thereto[z]. Not so, if it determine by the act of the party himself: as if tenant for years does anything that amounts to a forfeiture: in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default[a 11].

II. The second species of estates not freehold are estates at *will*. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession[b]. Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connexions with the other at his own pleasure[c]. Yet this must be understood with some restriction. For, if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits[d]. And this for the same reason, upon which all the cases of emblements turn; *viz.* the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land[e].

II. Estates at will.

[146]

Emblements.

What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must

Determination of the will.

[z] Co. Litt. 56.
[a] Ibid. 55.
[b] Litt. § 68.
[c] Co. Litt. 55.
[d] Ibid. 56.
[e] Ibid. 55.

(11) As to emblements, vide ante, p. 122.

either be made upon the land[f], or notice must be given to the lessee[g]) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber[h], taking a distress for rent and impounding it thereon[i], or making a feoffment, or lease for years of the land to commence immediately[k]; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure[l]; or, which is *instar omnium*, the death or outlawry of either lessor or lessee[m]; puts an end to or determines the estate at will.

The law is, however, careful, that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case [147] of emblements before mentioned; and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils[n]. And, if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year[o 12]. And, upon the same principle, courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other, which is generally understood to be six months[p 13].

Tenancies from year to year.

[f] Co. Litt. 55.
[g] 1 Ventr. 248.
[h] Co. Litt. 55. [9 Mee. & W. 643.]
[i] Ibid. 57.
[k] 1 Roll. Abr. 860. 2 Lev. 88.
[l] Co. Litt. 57.
[m] 5 Rep. 116. Co. Litt. 57, 62.
[n] Litt. § 69.
[o] Salk. 414. 1 Sid. 339.
[p] This kind of lease was in use as long ago as the reign of Henry VIII., when half-a-year's notice seems to have been required to determine it. (T. 13 Hen. VIII. 15, 16).

(12) Where rent is agreed to be paid in this manner, the tenancy is from year to year, or for some other recurrent period, and not at will. (Vide ante, p. 145, n.).

(13) See the note, ante, p. 144. Tenancies from year to year, being in a manner dependent on the will of each party for their continuance, though not so unconditionally as a tenancy at will in the technical sense of the word, and frequently arising out of a holding originally strictly at will, are often popu-

Copyholds were estates at will.

There is one species of estates at will that deserves a more particular regard than any other; and that is, an estate held by copy of court roll; or, as we usually call it, a *copyhold* estate. This, as was before observed[q], was, in its original and foundation, nothing better than a mere estate at will. But the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular customs established in their respective districts; therefore, though they still are held at the will of the lord, and so are in general expressed in the court rolls to be, yet that will is qualified, restrained, and limited, to be exerted according to the custom of the manor. This custom, being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and ascertained by the custom to be the same, and no other, that has time out of mind been

[q] Page 95.

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larly called tenancies at will, and the term has sometimes been so misapplied even by lawyers.

It has been already observed, that the payment of rent at or in respect of regular periods, converts an indefinite tenancy into a tenancy from year to year; and upon this principle, a tenancy, under a parol lease, void as such by reason of the Statute of Frauds, has frequently been held to be from year to year. The Statute of Frauds, 29 Car. 2, c. 3, s. 1, enacts, that all leases, estates, &c., made by parol, and not put in writing, and signed by the parties making the same, or their agents lawfully authorized by writing, shall have the force and effect of leases or estates at will only. But by the 3rd section are excepted leases, not exceeding the term of three years from the making thereof, whereon the rent reserved shall be two-thirds at least of the annual value. Under this statute, it has been held, that entry upon a parol demise for more than three years, followed by payment of rent or a promise to pay rent, creates a yearly tenancy upon the terms (except as to the duration of the demise) mentioned in the parol lease. (5 T. R. 471; 8 Id. 3; 3 Moo. & P. 281; 5 Scott, 58). But before any such payment or promise, it is a mere estate at will. (2 M. & W. 365).

Of course, by express agreement, an estate at will may be created, and may subsist, notwithstanding the payment of an annual rent. But an intention to this effect must clearly appear—a mere agreement to hold "at will" would not be sufficient. Where no rent or periodical compensation is paid, as where stables are let indefinitely, with an agreement that the lessor shall have all the dung, (4 Taunt. 128), or where a purchaser is let into possession before the execution of the conveyance, (5 Moo. & P. 370; 5 Mee. & W. 14), or where a minister is allowed by the trustees for a congregation to occupy a house rent free, (10 B. & Cr. 718; see 2 Cr. & J. 636; 9 Car. & P. 494); there the inference in favour of a yearly tenancy does not arise. See also the cases between mortgagor and mortgagee, cited in note (17) to p. 150.

exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom, as a tenant at will; the custom having arisen from a series of
[148] uniform wills. And therefore it is rightly observed by Calthorpe[r], that "copyholders and customary tenants differ not so much in nature as in name; for although some be called copyholders, some customary, some tenants by the virge, some base tenants, some bond tenants, and some by one name and some by another, yet do they all agree in substance and kind of tenure: all the said lands are holden in one general kind, that is by custom and continuance of time; and the diversity of their names doth not alter the nature of their tenure."

Copyholder may be tenant variously, according to the custom.

Almost every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor[14]; which customs differ as much as the humour and temper of the respective antient lords, (from whence we may account for their great variety), such tenant, I say, may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, or may hereafter consider, and hold them united with this customary estate at will. A copyholder may, in many manors, be tenant in fee-simple, in fee-tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition: subject, however, to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulged by immemorial custom, has declared to be a forfeiture or absolute determination of those interests; as in some manors the want of issue male, in others the cutting down timber, the non-payment of a fine, and the like. Yet none of these interests amount to freehold; for the freehold of the whole manor abides always in the lord only[s], who hath granted out the use and occupation, but not the corporal seisin or true legal possession, of certain parcels thereof, to these his customary tenants at will.

[r] On Copyholds, 51, 54.

[s] Litt. § 81. 2 Inst. 325.

(14) As to the copyhold tenure in the north of England, called "tenant right," which is not said to be held at the will of the lord, see 4 East, 270; 4 Per. & D. 579. An estate, held by copy of court roll according to the custom of the manor, though not expressed to be at the will of the lord, comes under the general description of a copyhold. (2 Cr., M. & R. 503).

The reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same land, be at one and the same time tenant in fee-simple, and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure; in which a grant of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein[t]. The lords, therefore, though they were willing to enlarge the interest of their villeins, by granting them estates which might endure for their lives, or sometimes be descendible to their issue, yet not caring to manumit them entirely, might probably scruple to grant them any absolute freehold; and for that reason it seems to have been contrived, that a power of resumption at the will of the lord should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands: and of course, as the freehold of all lands must necessarily rest and abide somewhere, the law supposed it still to continue and remain in the lord. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate in their lands, on performing their usual services, but yet continued to be stiled in their admissions tenants at the will of the lord—the law still supposed it an absurdity to allow, that such as were thus nominally tenants at will could have any freehold interest; and therefore continued and now continues to determine, that the freehold of lands so holden abides in the lord of the manor, and not in the tenant; for though he *really* holds to him and his heirs for ever, yet he is also *said* to hold at another's will. But with regard to certain other copyholders, of free or privileged tenure, which are derived from the antient tenants in villein-socage[u], and are not said to hold *at the will of the lord*, but only *according to the custom of the manor*, there is no such absurdity in allowing them to be capable of enjoying a freehold interest: and therefore the lord doth not suppose the freehold of such lands to rest in the lord of whom they are holden, but in the tenants themselves[v]; who are some-

Why copyholds are not freeholds.

[149]

Customary freeholds.

[t] Mirr. c. 2, § 28. Litt. § 204, 5, 6.

[u] See page 98, &c.

[v] Fitz. Abr. tit. *Corone*, 310; *Custom*, 12. Bro. Ab. tit. *Custom*, 2, 17; *Tenant per copie*, 22. 9 Rep. 76. Co. Litt. 59. Co. Copyh. § 32. Cro. Car. 229. 1 Roll. Abr. 562. 2 Ventr. 143. Carth. 432. Lord Raym. 1225.

times called *customary freeholders*, being allowed to have a freehold *interest*, though not of a freehold *tenure*[15].

Certain copyholds little inferior to freeholds.

However, in common cases, copyhold estates are still ranked (for the reasons above-mentioned) among tenancies at will; though custom, which is the life of the common law, has established a permanent property in the copyholders, who were formerly nothing better than bondmen, equal to that of the lord himself, in the tenements holden of the manor; nay, sometimes even superior; for we may now look upon a copyholder of inheritance, with a fine certain, to be little inferior to an absolute freeholder in point of interest, and, in other respects, particularly in the clearness and security of his title, to be frequently in a better situation[16].

III. Estates at sufferance.

III. An estate at *sufferance*, is, where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As, if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will and dies, the estate at will is thereby determined: but if the tenant continueth possession, he is tenant at sufferance[w]. But, no

[w] Co. Litt. 57.

(15) See Blackstone's Considerations on Copyholders, Law Tracts, 5th ed., vol. 1. The places in which the greater part of these customary freeholds exists, are, Cumberland, Westmoreland, Oversands in Lancashire, the south-western parts of Durham and Northumberland, and the northern border of Yorkshire. Among females of equal degree, the whole estate sometimes descends to the eldest, instead of being divided. (See Third Real Property Report, p. 20; 4 Per. & D. 579).

Enfranchisement and extinguishment of copyholds.

(16) The customary tenure may be put an end to either by *enfranchisement* or by *extinguishment*.

Enfranchisement is a conveyance or release (for it is immaterial in what form the transaction is effected, so that it is done either by feoffment and writing, or by deed, and the intention is manifest) by the lord (or his alienee) of his freehold estate, or of his seignoral rights, to the tenant; whereupon the latter immediately becomes seised of the lands in common socage, as tenant to the same superior of whom the lord holds the manor, (4 T. R. 443); and the lands are for ever and irretrievably discharged from all their customary incidents, rights of common, &c. (Cro. Jac. 253). The enfranchisement is in its nature a release of the reversion, and passes only such estate as the lord may have, and is therefore incomplete unless he has the fee-simple. If he had a mere life estate, the lands upon the expiration of that estate resume their copyhold character. (Watk. Cop.

man can be tenant at sufferance against the king, to whom no *laches*, or neglect, in not entering and ousting the tenant

362; 1 Jac. & W. 621; 4 East, 270). But an absolute enfranchisement is not hindered by the limited extent of the copyholder's estate; who, if he be only tenant for life, will take at common law a fee-simple, subject to a trust in equity for those in remainder. (Id.; 1 B. C. C. 515; 1 B. & Cr. 457; 2 D. & Ry. 511). Enfranchisement has been said not to alter the descent of a copyhold fee descended ex parte maternâ, (1 B. & Cr. 457); but this is quite inconsistent with principle.

Extinguishment is effected by a union of the copyhold and the freehold titles in the same person, and is distinguished from enfranchisement by the circumstance, that the copyholder by enfranchisement always gains the freehold; but by extinguishment, he either parts with all his interest, or takes back at most an estate for years at common law.

Some extinguishments destroy the tenure irretrievably, others do not. If the extinguishment happen by an escheat or surrender of the copyhold to the lord, the lands remain parcel of the manor, and may at a future time be regranted or redemised to hold by copy as before; but if once the particular lands become separated from the manor, while the copyhold tenure is suspended or extinguished, they can never afterwards be granted to hold by copy. But in no case can the demisable quality of the lands be for ever destroyed without the act of the owner of the fee-simple of the manor. (Cro. El. 459; 5 Mau. & S. 154). Thus, if the lord, being tenant in fee, enfeoff a stranger of the particular lands, and the copyholder surrender to the use of the feoffee, the demisable quality of the copyholds is gone for ever; but if a copyholder bargain and sell his copyholds to the lord, or surrender to his use, the lord or any future lord may at any time regrant them to hold by copy, or may destroy their grantable quality by conveying them to a stranger. If in either of these cases the lord had been tenant for life, the customary nature of the lands would have been restored on his death. (1 Russ. & M. 33). And if the union of the interests take place in different rights, as where a copyholder marries a feme seignoress, or the lord marries a feme copyholder, the tenure is only suspended during such union. (Co. Copyh. s. 62). Again, if a partial estate only in the copyhold is passed to the freeholder, there is only a suspension pro tanto. (Id. s. 34).

Enfranchisement and extinguishment of copyholds.

"If a copyhold is forfeited to the lord, or escheats, or otherwise comes to the lord's hands, if the lord makes a lease for years or for life, or other estate by deed or without deed, this land can never after be regranted by copy, for the custom is discharged, because during such estates the land was not demised nor demisable by copy. So, if the lord makes a feoffment in fee thereof upon condition, and afterwards enters for the condition broken, yet it can never be regranted by copy. But if the lord keeps the land in his hands for a long time, or lets it at will, he, his heirs or assigns, may well regrant it at his pleasure. So, if the interruption is wrongful, or if the lord is disseised, and the disseisor dies seised, or if the land is recovered against the lord by false verdict or erroneous judgment; in these cases, till the land is recovered or the judgment reversed by the lord of the manor, the land was not demised or demisable, and yet after the land is recontinued, it is grantable again by copy; but if the land so forfeited or escheated, before any new grant made, is extended upon a statute or recognizance acknowledged by the lord, or if the wife of the lord in a writ of dower has this land assigned to her, although these impediments are by acts in law, yet, inasmuch as the interruptions are lawful, the

is ever imputed by law; but his tenant, so holding over, is considered as an absolute intruder [x]. But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant; for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger [y]: and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful [17].

[x] Co. Litt. 57. [y] Ibid.

lands can never after be granted by copy. If a copyholder accepts a lease for years of the lord of his copyhold, the copyhold is destroyed for ever, and can never be granted again. If the copyholder takes a lease for years *of the manor*, by *that* his copyhold has not continuance; but such lessee may regrant the copyhold to whom he will, for this land was always demised or demisable." (4 Rep. 31; see 3 B. & Al. 153).

Such are the common-law rules as to the destruction and enfranchisement of copyholds. By a recent statute (4 & 5 Vict. c. 35, amended by 6 & 7 Vict. c. 23), provision is made for the enfranchisement of copyholds by lords having limited interests, and for the commutation of manorial rights, by agreement of a certain proportion of the parties interested, with the approbation of "The Copyhold Commissioners" (at present, the Tithe Commissioners). When an enfranchisement is made under the act, the tenant does not lose his commonable rights; and the new estate follows the course of devolution to which the old copyhold estate was subject.

(17) A tenant at sufferance is where a man cometh to the possession first lawfully, and holdeth over; but there is a diversity when one cometh to a particular estate in land by the act of the party, and where by act in law, for if the guardian hold over, he is an abator, because his interest came by act in law. (Co. Litt. 271. a.). This is because there can be no presumption of the owner's assent. So, if the tenant pretend to any larger estate, he is a disseisor. The important distinction between an estate at will and a holding at sufferance is, that, in the former case, there is a privity of contract, express or implied, between the parties, which does not exist in the latter. Both tenants are equally subject to immediate ejection; but before an action of ejectment can be commenced to recover the possession from a tenant at will, the landlord must put an end to the will by notice or demand of possession; which is not requisite in case of a holding at sufferance, under which indeed the only privilege which the tenant enjoys is, to be excused from liability as a trespasser in respect of his past occupation.

Some discussion has arisen as to the exact description of the situation of a mortgagor in possession, after he has conveyed the legal estate to the mortgagee. A mortgage at law is a convey-

Thus stands the law, with regard to tenants by sufferance: and landlords are obliged in these cases to make for- Tenants holding over.

ance of a legal estate, upon condition to be void upon re-payment of a sum of money on a certain day; after the execution of which conveyance, the mortgagor (i. e. the person who borrows the money and conveys the estate as a security) is usually allowed to retain the possession, and to act in most respects as owner of the estate, so long as he duly pays interest on the debt, and the mortgagee does not require the use of his principal. On default of payment on the day appointed, the estate belongs absolutely to the mortgagee at law; but this circumstance is always neglected, it being the practice of courts of equity to compel a re-conveyance on payment of the principal and interest, even after the lapse of many years from the day appointed for payment. In courts of law, however, nothing but the strict legal rights of the parties, as manifested by their express contracts and acts, are regarded.

In the absence of any special agreement, after the execution of a legal mortgage, the mortgagor, so long as he retains possession, is tenant at sufferance of the mortgagee; but if there is a general agreement, either verbal or by writing, that he shall retain the possession, and no term is specified, he is tenant at will. (See 1 Salk. 209; 3 Scott, 271; 1 T. R. 378; 3 Man. & R. 107; 2 B. & Ad. 473).

But the mortgage-deed often contains a stipulation that the mortgagor shall retain the possession, or that the mortgagee shall have possession, in certain events. The effect of clauses of this kind depends upon their particular terms. In Sheppard's Touchstone, p. 272, the law is thus laid down:—"If a man make a feoffment in fee, or other estate, upon condition that if such a thing be or be not done at such a time, that the feoffor, &c., shall re-enter; it is the common course, to the end that in this case the feoffor, &c., may have the land and continue in possession until that time, to make a covenant that he shall hold and take the profits of the land until that time; and the covenant in this case will make a good lease for that time, *if the uncertainty of the time (whereunto care must be had) do not make it void.* And, therefore, if A. bargain and sell his land to B., on condition to re-enter if he pay him 100*l.*, and B. doth covenant with A. that he will not take the profits until default in payment, or that A. shall take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease. And if the mortgagee covenant with the mortgagor that he will not take the profits of the land until the day of payment of the money; in this case, albeit the time be certain, yet this is no good lease, but a covenant only. If one give a bond for the quiet holding of a close for three years, it seems this is no lease in law." In the first instance given in this passage, of a covenant that A. shall take the profits until default, the objection intended by the author of the Touchstone seems to be, that the time of default is not specified, and so the covenant is no lease for want of certainty of time; and this is a good objection to the operation of the covenant as a demise; although it seems to be open to the mortgagor to contend that the proviso gives him an estate of freehold. But in the second example the objection is, that, although the time be certain, the words are negative only (that the feoffee shall not take, not that the feoffee shall take, the profits); and this is more questionable, although the distinction has been acted upon in some recent cases. The passage cited from Bacon's Abridgment (ante, p. 144, n. (9)) has been frequently recognised, and shews that any indication of intention that one person shall not have, or that the other shall have, Tenancy under mortgages.

mal entries upon their lands [z], and recover possession by the legal process of ejectment [17]: and at the utmost, by the

[z] 5 Mod. 384.

Tenancy under mortgages.

the possession for a certain time, is sufficient to make a lease, unless a contrary intention appear. Now such intention is just as clearly expressed by the negative words in the second case, as by the positive words in the first. And the authority of the Touchstone is much weakened by the consideration that the strictness of the old authorities has been relaxed in many modern cases. Thus, in Cro. Jac. 172, it was held, that a covenant to levy a fine to the use of B. on condition that if A. should pay 100*l.*, within 13 years, to B., he might re-enter, and a covenant that B. and his heirs should *enjoy* the land until the end of the thirteen years, was no demise to B., on the ground of the distinction between the words *enjoy* and *hold;* a distinction which would certainly not be recognised at the present day, and is contradicted by several old cases. (See 5 H. 7, 1; 2 Keb. 561, pl. 60; Vin. Ab., *Estate*, (U. a.) (X. a.), where a variety of contradictory authorities on this point are collected); 2 Salk. 588, pl. 3; 11 Mod. 42, pl. 1.

In Cro. Jac. 659, it seems to have been thought, that a proviso in a mortgage, that the mortgagee, his heirs and assigns, should not meddle with the actual possession of the premises or the perception of the rent until default in payment (on a day fixed), was no redemise to the mortgagor; but the point was not raised by the case.

In *Wilkinson* v. *Hall*, (4 Scott, 301), a covenant that it should be lawful for the mortgagors, their heirs and assigns, to have, hold, occupy, possess, and enjoy the premises, until default in payment of principal or interest, was held to be a redemise; and the court relied upon the passage in Bac. Ab. already referred to.

In *Doe* v. *Goldwin*, (2 Q. B. Rep. 143), L., who enjoyed an estate in right of his wife, had let it to the defendant, as a yearly tenant; the husband and wife then conveyed the estate to F., by way

(17) It has been a generally received notion, that if a tenant for a term, from year to year, at will, or at sufferance, hold over, and do not quit on request, the landlord is put to his action of ejectment, and cannot take possession; but see 7 T. R. 431; 1 Price, 53; 1 Bingh. 158; 6 Taunt. 202–7, from which it appears, that, if the landlord can get possession without committing a breach of the peace, he may do so; and indeed if he were to occasion a breach of the peace, and be liable to be indicted for a forcible entry, still he would have a defence to any *action* at the suit of the party wrongfully holding over, because the plea of liberum tenementum, or other title in the lessor, would necessarily be pleadable in bar. (7 Moore, 574). Therefore, a person who wrongfully holds over cannot distrain the cattle of the landlord put on the premises, (7 T. R. 471), or sue him in trespass for his entry. (1 Bingh. 158). —[CHITTY.] If the entry is illegal, however, it should seem that the possession gained by it would be also illegal, and therefore could not be relied upon to support a plea of liberum tenementum. But suppose the landlord to enter peaceably, and without any intention to break the peace, it is not clear that he might not, having thus acquired a lawful possession, turn the late tenant out, even by force, if that should be necessary. (See stat. 5 Rich. 2, st. 2, c. 8; 8 Hen. 6, c. 9; 1 Hawk. P. C. c. 64; 7 B. & Cr. 397; 8 Scott, 156; 1 Scott, N. R. 474; infra, Vol. 4, p. 147).

common law, the tenant was bound to account for the profits of the land so by him detained. But now, by statute

of security for an annuity, and upon trust to permit the wife to enjoy until default had been made for sixty days in payment of the annuity. It was held that this declaration of trust was a redemise to the wife; and if the annuity was granted for a term of years, (which does not appear in the report), this was a correct decision, since the lease had a certain termination; but if the annuity was for a life, then the case comes under the first class mentioned in the Touchstone, and the lease was bad for uncertainty.

In *Doe* v. *Lightfoot*, (8 Mee. & W. 553), it was held that a covenant by the mortgagor, that the mortgagee should enter into, have, hold, and enjoy the premises at all times after default, did not imply a redemise to the mortgagor; and the court cited and approved of the passage in the Touchstone, holding also that this was a mere qualification of the covenants for title. In that case, however, the mortgagee had not executed the deed, so that a redemise was out of the question.

Lastly, in *Doe* v. *Day*, (2 Q. B. Rep. 147), the mortgage-deed provided, that if the mortgagor did not pay on a day certain, it should be lawful for B., the mortgagee, after giving one month's notice, to enter into possession of the lands, to let and to sell them; and B. covenanted that he would sell or lease, without giving a month's notice. It was held, upon an ejectment brought after the day, that the mortgagor had no term, on the ground both that the time was uncertain, and that the covenant was not affirmative.

No one of the above cases, it will be observed, goes the length of supporting the second proposition cited from the Touchstone, although it was mentioned with approbation in several of them.

There are some other points, as to tenancy under mortgages, which are worthy of notice. If the mortgagor, being in possession under such a redemise as has been considered, hold over after the term has expired, he is a tenant at sufferance. (3 Lev. 387; 1 Salk. 245; 2 Moo. & P. 749). If the mortgagor, being tenant at sufferance, retains possession after the death of the mortgagee, he holds at the sufferance of the mortgagee's heir, while if, upon the mortgagor's death, his heir were to enter upon the vacant possession, he would be a disseisor. (1 Nev. & P. 205). And the payment on the one hand and the acceptance on the other, of interest upon the debt, would not be such a recognition of the occupation as to convert it into a tenancy at will. For the interest is paid in respect of the personal debt, and not of the land, which is but a collateral security; and in case of a mortgage in fee, upon the deaths of the mortgagor and mortgagee, the right in equity to the estate would descend to the heir of the one, and the legal title to the heir of the other, while the parties to pay and receive the interest and principal would be the respective executors of the mortgagor and mortgagee. (2 Moo. & P. 758; 2 B. & Ad. 473).

Tenancy under mortgages.

A question often arises as to the liability of an undertenant. The governing rule in these cases is, that a tenancy may be created between the occupier of land and the legal owner, by any mutual acknowledgment of the existence of such a tenancy; and that an occupier, who has once admitted that he holds of another person, cannot afterwards dispute that person's title to grant such a tenancy, though he may shew that his title has subsequently determined. (3 Nev. & P. 194). If a lease is in existence at the time of making the mortgage, of course it is not affected, and the mortgagee is entitled to demand the rent; but until he gives notice to the tenant, the latter

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4 Geo. II. c. 28, in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of the term, and demand made and notice in writing given by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person, so holding over or keeping the other out of possession, shall pay for the time he detains the lands, at the rate of double their yearly *value*. And, by statute 11 Geo. II. c. 19, in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former *rent*, for such time as he continues in possession. These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement [18].

Tenancy under mortgages.

is justified in paying the rent to the mortgagor, although he may refuse to do so. (3 Nev. & M. 193).

If the tenant has come in subsequently to the mortgage, and under the mortgagor, he is a trespasser, (unless the mortgagor had a term redemised to him), and may be ejected as such. (8 B. & Cr. 767; 2 Moo. & P. 749). But if the mortgagee recognise his tenancy, and give him notice to pay rent to himself, *and the tenant assent to that arrangement*, or by any act acknowledge that he holds of the mortgagee, this creates a new tenancy between the two parties, and the mortgagee may then distrain upon or sue the tenant for the rent as such; otherwise the tenant is only liable to an action for the value of his use and occupation of the premises; and in any of these cases the tenant may defend himself from a demand of rent by the mortgagor, by shewing that, before the rent claimed fell due, he received notice from the mortgagee to pay rent to him. But by no means can the mortgagee entitle himself to rent which falls due before he gives notice to the tenant. (5 Nev. & M. 513; 9 B. & Cr. 245; 1 Per. & D. 256; 1 Scott, N. R. 9).

(18) The proceedings of landlords to recover possession are facilitated by the stat. 1 Geo. 4, c. 87, (see 2 B. & Ad. 922); and in cases where the term does not exceed seven years, and the rent is not above twenty pounds a year, by the stat. 1 & 2 Vict. c. 74.

CHAPTER X.

OF ESTATES UPON CONDITION.

BESIDES the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate *upon condition;* being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated [a]. And these conditional estates I have chosen to reserve till last, because they are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates, then, upon condition, thus understood, are of two sorts: 1. Estates upon condition *implied:* 2. Estates upon condition *expressed;* under which last may be included, 3. Estates held in *vadio, gage,* or *pledge:* 4. Estates by *statute merchant,* or *statute staple:* 5. Estates held by *elegit.* Estates upon condition.

I. Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably from its essence and constitution, although no condition be expressed in words. As, if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office [b] [1], on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person [c]. For an office, either public or private, may be forfeited by *mis-user* or *non-user,* both of which are breaches of this implied condition. 1. By *mis-user,* or abuse; as if a judge takes a bribe, or a park-keeper I. Implied condition. [153]

[a] Co. Litt. 201. [b] Litt. § 378. [c] Ibid. §§ 378, 379.

(1) See 3 B. & Cr. 619.

kills deer without authority. 2. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby [d]. For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention: but private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief: upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect [e].

Forfeitures.

Upon the same principle proceed all the forfeitures which are given by law of life estates and others, for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee-simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, *viz.* that they shall not attempt to create a greater estate than they themselves are entitled to [f]. So, if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit felony," which the law tacitly annexes to every feodal donation [2].

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II. Condition expressed.

II. An estate on condition expressed in the grant itself, is where an estate is granted, either in fee-simple or otherwise, with an express qualification annexed [3], whereby the estate

[d] Co. Litt. 233. [e] 9 Rep. 50. [f] Co. Litt. 215.

(2) This is not so as to estates for years, which do not escheat to the landlord on conviction, but are forfeited to the crown, as part of the *goods* and *chattels* of the offender, and not by reason of any feudal condition.

(3) The defeazance or condition may be contained in a separate deed. There is a diversity between inheritances executed and inheritances executory; as land executed by livery, &c., cannot, by indenture of defeazance, be defeated

granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition[g]. These conditions are therefore either *precedent*, or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged: subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A., upon his marriage with B., the marriage is a precedent condition, and till that happens, no estate[h] is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred marks be paid[i]. But, if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent; and that if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed[k]. To this class may also be referred all base fees, and fee-simples conditional at the common law[l]. Thus, an estate to a man and his heirs, *tenants of the manor of Dale,* is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body, as this is no tenement within the statute of Westminster the second, it remains, as at common law, a fee-simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the eighth chapter: as, *durante viduitate, &c.:* these are es-

Precedent or subsequent.

[g] Co. Litt. 201.
[h] Show. Parl. Cas. 83, &c.
[i] Co. Litt. 217.
[k] Litt. § 325.
[l] See pages 109, 110, 111.

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afterwards. And so, if a disseisee release a disseisor, it cannot be defeated by indentures of defeazance made afterwards; but at the time of the release or feoffment, &c., the same may be defeated by indentures of defeazance; for it is a maxim in law, *quæ incontinenti fiunt in esse videntur.* But rents, annuities, conditions, warranties, and such like, that be inheritances executory, may be defeated by defeazances made either at that time or any time after; and so, the law of statutes, recognizances, obligations, and other things executory. (Co. Litt. 236. b.; 5 Rep. 90 b; Shep. Touchst. 125).

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tates upon condition that the grantees do not marry, and the like. And, on the breach of any of these subsequent conditions, by the failure of these contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determined and void.

Distinction between condition in deed and in law.

A distinction is however made between a *condition in deed* and a *limitation,* which Littleton [m] denominates also a *condition in law.* For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation* [4]: as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.* and the like [n]. In such case the estate determines as soon as the contingency happens, (when he ceases to be parson, marries a wife, or has received the 500*l.*), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c. [o]), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate [p] [5]. Yet, though strict words of condition

[m] § 380. 1 Inst. 234. [n] 10 Rep. 41. [o] Ibid. 42.
[p] Litt. § 347. Co. Litt. 214. b. Stat. 32 Hen. VIII. c. 31.

(4) More usually, at the present day, called a conditional limitation; but neither this term, nor that used in the text, has acquired a perfectly settled meaning.

(5) 1 Ves. sen. 420. In the case of a condition to determine a freehold estate, entry or claim is requisite; but in case of a condition in a lease for years, declaring that it shall be void in a certain event, the reversioner may treat the term as having absolutely determined when the event happens, without any entry; but if he recognise the existence of the term, after the event, he cannot subsequently take advantage of the forfeiture; nor can the tenant

be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives, (as if an estate be granted by A. to B., on condition that within two years B. intermarry with C., and on failure thereof then to D. and his heirs), this the law construes to be a limitation and not a condition [q]: because, if it were a condition, then, upon the breach thereof, only A. or his representatives could avoid the estate by entry, and so D.'s remainder might be defeated by their neglecting to enter [6]; but, when it is a limitation, the estate of B. determines, and that of D. commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition [r].

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Between a limitation and condition.

In all these instances, of limitations or conditions subsequent, it is to be observed, that so long as the condition,

Conditions unbroken, grantee holds in full extent.

[q] 1 Vent. 202. [r] Cro. Eliz. 205. 1 Roll. Abr. 411.

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treat his lease as having become void by his own default, until the lessor has declared his option; and it is immaterial whether the word *void* or *voidable* is used. But of course, if the lease is to be voidable by entry, the lessor must make an entry. (Wms. Saund. 287 d; 4 B. & Al. 401; 1 Nev. & M. 443; 5 B. & Ad. 765; 4 B. & Ad. 664).

(6) The *neglect* of A. or his heirs to enter can hardly be said to defeat D.'s remainder, since entry by A. or his heirs would have the same effect, such entry defeating the seisin upon which the limitations were founded, and giving back to the grantor and his heirs their old seisin and estate. (Litt. s. 347). No entry, or re-entry (which is all one) may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heirs; and such re-entry cannot be given to any other person; and, before the statute 32 Hen. 8, c. 34, if the lessor of a freehold or leasehold estate upon condition granted away his reversion, the right to re-enter was gone; for the stranger could not enter, and the lessor, having parted with his reversion, could not enter as of his former estate. (Id.) But by the statute 32 Hen. 8, c. 34, the grantee of the reversion, upon a lease for years or life by indenture, has the same power of re-entry upon breach of condition for payment of rent, repairs, &c., as the lessor or his heir. (See 1 Wms. Saund. 237).

The student should bear in mind, that the rules as to conditions, remainders, &c., laid down in this part of the work, have reference to estates subsisting at common law, and do not apply to executory limitations under the Statutes of Uses and Wills.

either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life, or no estate at all, which is constructively an estate for life. For the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold [s]; because the estate is capable to last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner, (as a grant for ninety-nine years, provided A., B., and C., or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

Conditions impossible, or contrary to law.

These express conditions, if they be *impossible* at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be *contrary to law,* or *repugnant* to the nature of the estate, are void. In any of which cases, if they be conditions *subsequent,* [157] that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a feoffment be made to a man in fee-simple, on condition that, unless he goes to Rome in twenty-four hours, or unless he marries with Jane S. by such a day, (within which time the woman dies, or the feoffor marries her himself), or unless he kills another, or in case he alienes in fee; that then and in any of such cases the estate shall be vacated and determined: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant [t]. But if the condition be *precedent,* or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant; for he hath no estate until the condition be performed [u].

If subsequent, estate becomes absolute in feoffee.

If precedent, grant void.

[s] Co. Litt. 42. [t] Ibid. 206. [u] Ibid.

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are,

III. Estates held *in vadio*, in *gage*, or pledge: which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*. III. Estate in mortgage.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another; and grants him an estate, as, of 20*l. per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living; it subsists and survives the debt: and, immediately on the discharge of that, results back to the borrower[w] [7]. But *mortuum vadium*, a dead pledge, or *mortgage*, (which is much more common than the other), is where a man borrows of another a specific sum (*e. g.* 200*l.*) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor: in this case, the land which is so put in pledge, is by law, in case of non-payment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage[x]. But as it was formerly a doubt[y], whether by taking such estate in fee, it did not become liable to the wife's dower, and other incumbrances, of the mortgagee, (though that doubt has been long ago over-ruled by our courts of equity[z]), it therefore became usual to grant only a long term of years by way of mortgage; with condition to

[158]

Form of mortgage.

[w] Co Litt. 205.
[x] Litt. § 332.
[y] Ibid. § 357. Cro. Car. 191.
[z] Hardr. 466.

(7) Pledges of this kind, and what are called Welsh mortgages, which are very similar in effect, are now almost entirely out of use. (See 1 Vern. 476; 2 Atk. 360; 1 Meriv. 114; 1 Younge, 610).

be void on re-payment of the mortgage money: which course has been since pretty generally continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

Legal and equitable consequences of mortgage.

As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of equity interpose; and, though a mortgage be thus forfeited, and the [159] estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate [8]; paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth 1000*l.* might be forfeited for non-payment of 100*l.* or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption:* and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium.* But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or, in default thereof, to be for ever *foreclosed* from redeeming the same; that is, to lose his equity

Equity of redemption.

Foreclosure.

(8) The period within which redemption will be allowed after the last acknowledgment of title by the mortgagor is now fixed by statute at twenty years, with a further allowance in cases of disabilities; the rule thus established being in substance the same as that which had previously been acted upon by courts of equity. (Stat. 3 & 4 Will. 4, c. 27, s. 28).

of redemption without possibility of recall. And also, in some cases of fraudulent mortgages[a], the fraudulent mortgagor forfeits all equity of redemption whatsoever[9]. It is not, however, usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law, whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was where the possession of the thing pledged remained with the debtor[b]. But, by statute 7 Geo. II. c. 20, after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment; but may be compelled to re-assign his securities. In Glanvil's time, when the universal method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor; "*si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet;*" for which the reason given is to prevent subsequent and fraudulent pledges of the same land; "*cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum*

Fraudulent mortgage forfeits equity of redemption.

Mortgagee must re-assign, on money tendered.

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[a] Stat. 4 & 5 W. & M. c. 16.

[b] *Pignoris appellatione eam proprie rem contineri dicimus, quae simul etiam traditur creditori. At eam, quae sine traditione nuda conventione tenetur, proprie hypothecae appellatione contineri dicimus.* (Inst. l. 4, t. 6, § 7).

(9) By the 4 & 5 W. & M. c. 16, if any person mortgages his estate, and does not previously inform the mortgagee in writing of any prior mortgage, judgment, statute, or recognizance, which he has voluntarily brought upon the estate, and does not (in the case of a prior judgment, &c.) within six months after notice from the second mortgagee under hand and seal pay off such judgment, &c., the second mortgagee shall hold the estate as an absolute purchaser, free from the equity of redemption of the mortgagor. This statute is, perhaps, the most remarkable legislative *bull* on record; it is intended to prevent fraud on second mortgagees, which fraud can only have been practised when, by reason of prior concealed charges, the estate is not of sufficient value to answer the second charge, and the equity of redemption is worth less than nothing. When this equity of redemption which the act presents to the second mortgagee is of any value, no fraud has been committed. Accordingly, the only case which has arisen on the act is one where a second mortgagee endeavoured to defraud *the mortgagor* by means of it, but was not allowed to do so. (2 Vern. 589).

posterius invadiari[c]." And the frauds which have arisen, since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our antient law[10].

[c] L. 10, c. 8.

Mortgages.

(10) The principles upon which courts of equity interfere with and control the legal rights of mortgagees became settled about the commencement of the 17th century; since which time mortgage transactions (so frequent and important in this commercial country) have become a considerable head of equity law, and have ceased to depend upon the common-law doctrine of conditions. As, however, the arrangement of the Commentaries does not afford any more convenient place, this opportunity is taken for stating very briefly some of the more important incidents of a modern mortgage.

A mortgage is a security for a subsisting or future debt, by a transfer of real or personal property, or of some interest in or power over such property, redeemable at law (if the legal estate be transferred) by payment of the debt and interest according to the condition expressed in the instrument, and redeemable in equity according to certain rules observed in courts of equity, without regard to any restrictions which the parties may attempt to impose upon the power of redemption.

A mortgage of freehold land at common law was usually a feoffment in fee upon condition to be void if the feoffor or his heirs should, on a fixed day, (and if no day was fixed the feoffor had his whole life, Co. Litt. 208. b.), pay the debt and interest to the feoffee or his representatives; and at law the effect of performing the condition was to defeat the feoffment and restore the mortgagor to his original estate, while non-payment on the day gave the estate to the mortgagee for ever discharged of the condition. It afterwards became usual to effect the security by a conveyance called a lease and release, or by a bargain and sale, or by demising the land for a long term of years; and sometimes, instead of a condition, an agreement was inserted, that on repayment on a certain day the estate should be reconveyed. Whatever form the transaction assumed, the letter of the deed was strictly enforced at law; but equity soon established the rule, that the right of the mortgagor to redeem should exist, notwithstanding any stipulation to the contrary, until barred by lapse of time, (i. e. by enjoyment by the mortgagee during twenty years, or in case the mortgagor or his representative were under any disability, such as absence beyond seas, coverture, infancy, &c., a longer period, without any recognition of the mortgagor's title by paying interest or otherwise), (vide infra, p. 226, n.), or by foreclosure, which is a decree in a suit in equity by the mortgagee, directing the mortgagor to repay the money and interest within six months, or some other short period, or to be for ever foreclosed and barred of his right to redeem. After a decree of foreclosure, the mortgagor's right to redeem, or *equity of redemption*, as it is called, is utterly extinguished. Until extinguished it is regarded as a distinct equitable estate, descendible to the heir, subject to curtesy and dower, and capable of being assigned with all its incidents.

No agreement between the parties, at the time of making the mortgage or afterwards, so long as the debt is allowed to subsist, can limit or control this equity to redeem, the maxim of equity being "once a mortgage, always a mortgage;" and whether the conveyance of the estate and the proviso for redemption are contained in

IV. A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant* and *statute* IV. Estates by statute staple, and statute merchant.

the same or in separate deeds, and even where from fraud or otherwise no proviso for redemption has ever been executed, (2 Vern. 84; Prec. Ch. 526), courts of equity, upon proof that the transaction was originally a mortgage, and that its character has not since been altered, will always allow the mortgagor or his representatives to redeem the estate, if not barred by lapse of time or by a previous decree of foreclosure. "In the case of a mortgage, you shall not by special terms alter what this court says are the special terms of the contract." (7 Ves. 273). Mortgages.

All that is necessary to constitute a mortgage is a subsisting *debt*, and a transfer of property in consideration of and by way of security for, and not in satisfaction of, such debt. And this constitutes the distinction (as to which there was formerly much uncertainty and doubt) between a mortgage and a conditional or defeasible purchase. If A. sell and convey an estate to B. in consideration of £100, and it is agreed that A. may repurchase the estate again on a certain day, upon payment of £150; but that, if he do not repurchase on that day, B. shall keep the estate for ever, this is a conditional sale, and equity will not interfere with the condition; but if A. at the same time give to B. a bond for payment of the £100 and interest, or if the £100 were a debt already owing from A. to B., and which from the circumstances appears to be regarded as still subsisting, or if for any other reason it appears that the primary character of the transaction was not a sale of the estate, but a loan of money upon the security of the estate,—if, in short, it appear that at the same time that A. has this option to re-purchase, B. has a right to sue for the original consideration money as a debt, this is a mortgage, redeemable upon the usual terms. (*Williams* v. *Owen*, 10 Sim. 386, reversed, on appeal, by the Lord Chancellor, 5 Jur. 114; 4 Beav. 197). Unless both parties are at liberty to treat it as a mortgage, neither of them can do so.

Again, if, after a mortgage has been made, the parties agree that the mortgagee shall keep the estate as his own, but that the mortgagor may repurchase it at a given day, and at the same time the mortgagee releases the mortgagor from the debt, this changes the relation of the parties, and extinguishes the mortgage; but wherever there has once been a mortgage, courts of equity look with great suspicion on any transactions of this kind, in which advantage may be so easily taken of the indebted and embarrassed situation of the original owner of the estate.

The characteristic of a mortgage then is, that it is a security for a debt; and in equity the debt is always considered as the principal, and the mortgaged estate as the accessory. Therefore, the right to the benefit of the security belongs to the person who is entitled to the debt; and in case of the death of a mortgagee in fee, although the estate devolves upon his heir, he takes it for the benefit of the executor, who is entitled to the debt, and who in case of foreclosure, or bar by lapse of time, may claim the absolute benefit of the estate itself. (3 Swanst. 628; 2 Vern. 193, 367). As soon as the debt is extinguished by either of these means, the estate resumes its proper character, and becomes transmissible in equity as well as at law to the heirs of the mortgagee or of his representative. (4 Madd. 483). On the other hand, as the mortgage is merely a *collateral* security for the debt, if the mortgagor die, his personal assets are liable in the first instance to be applied in satisfaction by the executor; and in case of a mort-

staple [11]; which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall

Mortgages.

gage of an estate of inheritance, the heir or devisee of the mortgagor is entitled to have such assets as are primarily applicable for payment of debts applied for that purpose, so as to exonerate and redeem the mortgaged estate. (1 P. W. 290; 2 Id. 386; 3 Id. 358; 1 Atk. 621; 7 Ves. 336; 3 Myl. & K. 358).

But if the equity of redemption is conveyed away by the original mortgagor to another person, as such person did not contract, and is not personally liable, for the debt to the mortgagee, the estate in his hands is no longer a collateral security, but is primarily liable for the debt, and on his death the heir cannot call upon the executor to redeem the estate for his benefit. (2 P. Wms. 664; 5 Madd. 96; 3 Myl. & Cr. 763). But by dealings with the mortgagee, even an alienee of an equity of redemption may so take upon himself the debt, as to restore to the estate its privilege as a mere collateral security. (7 Ves. 333; 14 Id. 423; 1 Sim. 453; 3 Myl. & K. 607. See 1 Y. & C. N. C. 688).

In order, as it seems, to prevent a multiplicity of suits, courts of equity have long acted upon the rule, where two mortgages have been made by the same mortgagor to the same mortgagee, to refuse to allow the mortgagor to redeem one, if the mortgagee insists on having both redeemed, although the mortgages were made at different times, of different estates, and to secure distinct independent debts; so that, if one of the estates is more than sufficient to secure the debt charged on it, it may be used in aid of any deficiency in the other security. Under this rule the mortgagee is said to *tack* one security to the other. (2 Vern. 286; 2 Ves. jun. 376; 2 Gl. & Ja. 47). And this right to tack a second mortgage debt to a prior mortgage may be exercised to the exclusion of the claims of any third person to whom in the mean time the mortgagor has mortgaged the equity of redemption in the first estate, provided the mortgagee, when he took his second mortgage, was not aware of such mesne incumbrance. (Ambl. 733; 6 Ves. 229, n.).

Some account of the rules by which equity regulates the priorities of several incumbrancers on the same fund will be found in a note to p. 383, infra.

A few remarks may be made in conclusion on the forms of mortgages. Formerly it was much the custom, where the mortgagor was tenant in fee-simple, not to part with the freehold, but to grant or demise the land for a long term of years, with a proviso for redemption; this plan had the advantages of economy, (the conveyance being shorter and cheaper), and of leaving to the mortgagor all the privileges of a freeholder, while the term, being personal estate, devolved upon the same class of representatives as were entitled to the money secured, instead of vesting, as sometimes happens, in an infant heir; and where the property is of much greater value than the sum to be secured, this form is still occasionally resorted to. But if the mortgagee is obliged to have recourse to his remedy by foreclosure, he cannot, under such a mortgage, acquire more than an absolute term of years; an estate which is not of so much value as the inheritance. Even under a mortgage in fee, the mortgagee, in order to realise his security, was obliged to resort to the slow and costly remedy of a foreclosure suit, a remedy of which the evil was

(11) As to these securities in general, see 2 Saunders, by Wms., 70 c, n., and index, *Statute Merchant* and *Statute Staple*; 8 Price, 316.

discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I. *de mercatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 Edw. III. c. 9, before the mayor of the staple, that is to say, the grand mart for the principle commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns[d], from whence

[d] See Book I., c. 8.

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chiefly felt in those cases where it was most often required to be put into operation—in cases of deficient security. To obviate these inconveniences, it has now become common to insert in the mortgage an authority or power enabling the mortgagee, at any time after default in payment of the principal or interest, to sell the estate to a fair purchaser, and to repay himself his debt, interest, and costs out of the proceeds. (See the form in the Appendix to this volume). This power is always made exercisable without the mortgagor's consent; but in order to prevent any surprise upon the latter, and to enable him to seek for the means of redemption, it is often provided that the mortgagor shall be entitled to three or six months' notice of the sale. The mortgagee, having the conduct of the sale, is of course disabled from purchasing the estate either directly or through the intervention of a trustee; under the general rule of equity, that the interest of a buyer, who seeks to pay as little as possible, and the duty of a trustee for sale, who should endeavour to obtain as much as possible, being conflicting and incompatible, cannot be allowed to coexist in the same person. And the rule cannot be relaxed even in favour of a sale by auction, supported by every evidence of fairness. (3 Meriv. 200; 8 Br. P. C. 42, Toml. ed.; 8 Cl. & Fin. 265).

In Ireland foreclosure is never allowed, the courts invariably directing a sale; and, in this country, a sale is often directed, even where the legal estate is mortgaged, and more frequently where the mortgage is nothing more than a mere equitable charge on the property, or where the property is stock, or other personal chattels. (2 Myl. & K. 417; but see 2 You. & C. 730; 2 Myl. & Cr. 419; 7 Sim. 439, 669; 8 Id. 470; 1 Hare, 422, 533). Mortgages.

An equitable mortgage may be constituted by any writing which shews an agreement that the property in question is intended to stand as a security for the debt, (2 Salk. 449; 11 Ves. 626); and even without writing (notwithstanding the Statute of Frauds), if the debtor deposit the title-deeds relating to the property with his creditor as a security. And where no other object or intention can be shewn, it will be presumed that title-deeds delivered by a debtor to his creditor are so delivered as a security. (19 Ves. 202, 258; 3 You. & J. 150; 1 You. & C. 303). And parol evidence is admissible to shew that advances made subsequently to the deposit were made on the same security. (2 Ves. & B. 79; 2 Mon., D. & D. 124). These mortgages by deposit are very much in use among bankers and mercantile men, being recommended by the secrecy, quickness, and economy of the transaction; but an equitable mortgagee so constituted is liable to have his security defeated by many contingencies, against which a regular legal mortgage would have secured him. (See Cr. & Ph. 323).

this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands [12] may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, acknowledged before either of the Chief Justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile transaction is extended to all the king's
[161] subjects in general, by virtue of the statute 23 Hen. VIII. c. 6, amended by 8 Geo. I. c. 25, which directs such recognizances to be enrolled and certified into Chancery. But these, by the statute of frauds, 29 Car. II. c. 3, are only binding upon the lands in the hands of *bonâ fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record [13].

V. Estate by elegit.

V. Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. What an *elegit* is, and why so called, will be explained in the third part of these commentaries. At present I need only mention, that it is the name of a writ, founded on the statute [e] of Westm. 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one half of the defendant's lands and tenements, to be occupied and enjoy-

[e] 13 Edw. I., c. 18.

(12) That is to say, his freehold lands, and lands in antient demesne, but not his copyholds. (2 Inst. 397; 4 Id. 270; 3 Rep. 80; 8 Ves. 394).

(13) The statute 33 Hen. 8, c. 39, s. 50, enacts, that all obligations and specialties, concerning or for the benefit of the crown, shall have the force and effect of a statute staple. And the statute 13 Eliz. c. 4 subjects the lands of "accountants" to the crown to debts to the crown, incurred at any time during the accountantship, in the same manner as if such debts had been secured by statute staple at the commencement of the accountantship. (See also 12 Eliz. c. 7; 27 Eliz. c. 3). By the statute 25 Geo. 3, c. 35, the crown has the further privilege of *selling* the debtor's lands. (See 41 Geo. 3, c. 90; 1 & 2 Geo. 4, c. 121).

ed, until his debt and damages are fully paid: and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe, that this is also a mere conditional estate defeasible as soon as the debt is levied. But it is remarkable that the feodal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier, and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of *quia emptores* [f], it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the statute therefore of Westm. 2. permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *de mercatoribus* (passed in the same year [g]) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though only *half* of them was liable to be taken in execution for any other debt of the owner [14].

I shall conclude what I had to remark of these estates, by statute merchant, statute staple, and *elegit*, with the observation of Sir Edward Coke [h]. "These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds;" (which makes them an exception to the general rule) "because, though they may hold

Estates by statute and elegit are chattels.

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[f] 18 Edw. I. [g] 13 Edw. I. [h] 1 Inst. 42, 43.

(14) The Statute of Westminster 2 gave the judgment creditor the possession of half only of the debtor's freehold lands; but the recent statute 1 & 2 Vict. c. 110 has extended the creditor's remedy to the entirety of the lands, copyhold as well as freehold, belonging to his debtor, and to all lands, rectories, tithes, rents, and hereditaments held in trust for the debtor, or over which he has any disposing power, exercisable for his own benefit without the consent of any other person, including therefore all unprotected estates-tail vested in him, and all estates over which he has a general power of appointment; and the effect of a judgment is given to rules, orders, and decrees, for payment of money, of courts of law and equity.

By an enactment of the following session (2 & 3 Vict. c. 11), the statute of 1 & 2 Vict. c. 110 is deprived of all operation so far as concern the interests of purchasers and mortgagees without notice of the judgment, &c. which is sought to be enforced against them; so that if A., a judgment debtor, entitled to Blackacre and Whiteacre, sell Blackacre to B., who has no notice of the judgment, and retain Whiteacre, the creditor may extend the whole of Whiteacre under the judgment, but can only take one moiety of Blackacre; because, so far as B. is concerned, the judgment has no further operation than belongs to it under the Statute of Westminster 2.

an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid; yet it shall go to their executors: for *ut* is similitudinary; and though, to recover their estates, they shall have the same remedy (by assise) *as* a tenant of the freehold shall have[i], yet it is but the similitude of a freehold, and *nullum simile est idem*[15]." This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold: but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir; which is probably owing to this: that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has therefore thus directed their succession; as judging it reasonable, from a principle of natural equity, that the security and remedy should be vested in those to whom the debts, if recovered, would belong. For, upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to *his* executors[k]: because they being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.

[i] The words of the Statute de Mercatoribus are, "*puisse porter bref de novele disseisine, auxi sicum de frank-tenement.*"

[k] Co. Litt. 42.

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(15) This passage is put together from two places in Co. Litt., a good deal transposed and altered in parts; the words "estate of inheritance or for life" do not occur in the original; and I conceive that the fact of the land going to the executor and not to the heir, shews that the estate can in no case be one of inheritance.—[COLERIDGE.] The learned annotator has here perhaps misconceived the intention with which the words "estate of inheritance or for life" were used in the text, which seem to have reference to the estate of the debtor, and not to that of the creditor; the commentator's meaning, it is suggested, being, in more words, that "the creditor may take an estate of inheritance or for life belonging to his debtor, and hold it by elegit, *ut liberum tenementum*," until the debt be paid.

CHAPTER XI.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

Time of enjoyment of estates.

HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view; with regard to the *time of their enjoyment*, when the actual pernancy of the profits (that is, the taking, perception, or receipt of the rents and other advantages arising therefrom) begins. Estates, therefore, with respect to this consideration, may either be in *possession* or in *expectancy:* and of expectancies there are two sorts; one created by the act of the parties, called a *remainder;* the other by act of law, and called a *reversion.*

I. Estates in possession.

I. Of estates in *possession,* (which are sometimes called estates *executed,* whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates *executory*), there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenants possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention[1].

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II. Estates in remainder.

II. An estate then in remainder may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee-simple granteth lands to A. for twenty years, and, after the deter-

(1) It must be remembered that through the greater part of this chapter the author is speaking of the common law only, and that many limitations here stated to be inadmissible may be good when they are limited to take effect under the Statute of Uses or of Wills.

mination of the said term, then to B. and his heirs for ever: here A. is tenant for years, remainder to B. in fee. In the first place, an estate for years is created or carved out of the fee, and given to A.; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee[a]. They are indeed different *parts*, but they constitute only one *whole:* they are carved out of one and the same inheritance: they are both created, and may both subsist, together; the one in possession, the other in expectancy. So, if land be granted to A. for twenty years, and after the determination of the said term to B. for life; and after the determination of B.'s estate for life, it be limited to C. and his heirs for ever: this makes a tenant for years, with remainder to B. for life, remainder over to C. in fee. Now here the estate of inheritance undergoes a division into three portions; there is first A.'s estate for years carved out of it: and after that B.'s estate for life; and then the whole that remains is limited to C. and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing: upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole[2]. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple[b]: because a fee-simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate: a remainder therefore,

[a] Co. Litt. 143. [b] Plowd. 29. Vaugh. 269.

(2) It is scarcely necessary to remind the student that this reference of the law of remainders to mathematical reasoning is a mere flight of our author's fancy, and perhaps in little better taste than Lord Coke's illustration of one of the rules of inheritance by the laws of gravity. It will soon be found that, in law, things which are equal to the same thing are not always equal to each other; that an estate vested in A. for his own life is, in the eye of the law, greater than an estate vested in B. for the life of C.; although, if A. and B. were to convey their respective estates to C., the relation between them would be suddenly inverted, and the law would then regard that estate as the greater which before the conveyance was the lesser. (Infra, p. 177, n. (23)).

which is only a portion, or residuary *part*, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only [165] one fee-simple; as 40*l.* is part of 100*l.*, and 60*l.* is the remainder of it: wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than after the whole 100*l.* is appropriated there can be any residue subsisting [3].

Thus much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

There must be some particular estate precedent,

1. And, first, there must necessarily be some particular estate, precedent to the estate in remainder [c]. As, an estate for years to A., remainder to B. for life; or, an estate for life to A., remainder to B. in tail. This precedent estate is called the *particular* estate, as being only a small part, or *particula*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason; that *remainder* is a relative expression, and implies that some part of the thing is previously disposed of: for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

[c] Co. Litt. 49. Plowd. 25.

(3) An estate in fee-tail is considered to be less than a fee-simple, and therefore may have a remainder limited after it; and even when the issue are barred, and the entail converted into a base fee, the remainder may subsist. But a conditional fee, such as an estate-tail was before the statute De Donis, (ante, p. 112), cannot be followed by a remainder; it leaves only a possibility of reverter in the donor. (5 Scott, 770). And although by creating an estate-tail with remainder, and subsequently converting the entail into a base fee, there may be a remainder upon a base fee, yet, if a base fee is created by original limitation, no remainder can be limited after it. (Co. Litt. 18. a.; 10 Rep. 97 b; *Badham* v. *Mee*, 1 M. & Sc. 14; 1 Myl. & K. 32). The rule does not prohibit the limitation of *alternative contingent* remainders; as, where the limitation is to A. for life, remainder to his unborn son in fee, and if he have no son, to B. This is not properly a remainder upon a fee, i. e. an estate to take effect on the expiration of a fee, but a substituted limitation in case the former never vests, or, as it is called, a contingency with a double aspect. (Fearne, C. R. 373, 7th ed.; 3 T. R. 495; 2 Marsh. 161).

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder; it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the antient law [d], to be executed either now or hereafter, as the contracting parties should agree; but an estate of freehold must be created to commence immediately.

as no freehold can commence in futuro.

For it is an antient rule of the common law, that an estate of freehold cannot be created to commence *in futuro;* but it ought to take effect presently, either in possession or remainder [e]: because at common law no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A. for seven years, to commence from next Michaelmas, is good; yet a conveyance to B. of lands, to hold to him and his heirs for ever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A. for three years, with remainder to B. in fee, and makes livery of seisin to A.; here by the livery the freehold is immediately created, and vested in B., during the continuance of A.'s term of years [4]. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in præsenti,* though to be occupied and enjoyed *in futuro.*

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[d] Raym. 151. [e] 5 Rep. 94.

(4) The livery to A. passes the freehold at once to B., A. taking it as B.'s tenant.

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over[f]. For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder[5]. Besides, if it be a freehold remainder, livery of seisin must be given at the time of its creation; and the entry of the grantor to do this determines the estate at will in the very instant in which it is made[g]: or if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *remainder;* for it is a separate independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken[h]. And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also[i]: as where the particular estate is an estate for the life of a person not *in esse*[k]; or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate[l]; in either of these cases the remainder over is void[6].

An estate at will cannot support a remainder.

[167]

If particular estate is defeated, remainder is also.

2. A second rule to be observed is this: that the remainder must commence or pass out of the grantor at the time of the

2. Remainder and particular estate must pass

[f] 8 Rep. 75.
[g] Dyer, 18.
[h] Raym. 151.
[i] Co. Litt. 298.
[k] 2 Roll. Abr. 415.
[l] 1 Jon. 58.

(5) A lease at will, however, leaves a reversion, which may be released to the tenant at will. The better reason is, that an estate at will requires for its existence the concurrence of the wills both of the tenant and the reversioner; and in the case supposed, the reversioner or intended remainder-man cannot, from the necessity of the case, express any will in the matter, for, until after the creation of the remainder, he has no estate upon which his will can operate; and the will of the original grantor is determined by the very act of willing that some other person shall have the reversion, i. e. that the tenant at will shall cease to hold of himself.

(6) The student will perceive, from what follows in this chapter, that a *vested* remainder is not liable to be defeated by the failure of the particular estate.

out of grantor at same time.

creation of the particular estate [m]. As, where there is an estate to A. for life, with remainder to B. in fee: here B.'s remainder in fee passes from the grantor at the same time that seisin is delivered to A. of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a *freehold* remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor, otherwise the remainder is void [n]. Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and enure to him in remainder, as both are but one estate in law [o] [7].

[168]

3. Remainder must vest instantly upon determination of particular estate.

3. A third rule respecting remainders is this: that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines [p]. As, if A. be tenant for life, remainder to B. in tail: here B.'s remainder is vested in him, at the creation of the particular estate to A. for life: or if A. and B. be tenants for

[m] Litt. § 671. Plowd. 25.
[n] Litt. § 60.
[o] Co. Litt. 49.
[p] Plowd. 25. 1 Rep. 66.

(7) The possession of a tenant for years is considered by the law to be the seisin of the reversioner or freeholder; so that where land is conveyed to A. for years, remainder to B. for life or in fee, and seisin is given to A., the effect is, that B. becomes presently seised in possession, by reason of the occupation of A., his tenant for years. In truth, the term 'remainder' is not strictly applicable to an estate of freehold expectant upon an estate for years, at least when created by a common-law conveyance; it has all the properties and incidents of a reversion, if we look at the right to the possession, and, if we confine our regard to the freehold, of an estate in possession. Thus, an estate-tail expectant on a term of years is considered to be in possession. "It is said, that an estate-tail limited after an estate for years is a remainder. I deny that, as a general proposition. Can any case be shewn where an estate for years was given to A., with limitation over to B. for life or in fee, and B. was held not to take an immediate estate of freehold?" (Per Patteson, J., 4 B. & Ad. 306). Hence it is that a contingent remainder cannot be expectant upon a term of years merely; for the seisin cannot remain in the termor, and, until the event happens, it cannot pass out of him to the contingent remainder-man; it therefore passes on and vests in the next vested remainder-man, or in the reversioner, for ever shutting out the contingent estate.

their joint lives, remainder to the survivor in fee; here, though during their joint lives the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A. for life, remainder to the eldest son of B. in tail, and A. dies before B. hath any son; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate: and even supposing that B. should afterwards have a son, he shall not take by this remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone for ever[q]. And this depends upon the principle before laid down, that the precedent particular estate, and the remainder, are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate and the remainder supported thereby[r]: the thing supported must fall to the ground, if once its support be severed from it.

Vested remainder.

It is upon these rules, but principally the last, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed* whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As, if A. be tenant for [169] twenty years, remainder to B. in fee; here B.'s is a vested remainder, which nothing can defeat or set aside.

Contingent.

Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event;* so that the particular estate may chance to be determined, and the remainder never take effect[s][8].

[q] 1 Rep. 138. [r] 3 Rep. 21. [s] 3 Rep. 20.

(8) "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to that every remainder for life or in tail

May be limited to dubious person, as unborn child.

First, they may be limited to a dubious and uncertain *person*. As if A. be tenant for life, with remainder to B.'s eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B. will have a son or no: but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A. had died before the contingency happened, that is, before B.'s son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A. were tenant for life, remainder to his own eldest son in tail, and A. died without issue born, but leaving his wife *enseint*, or big with child, and after his death a posthumous son was born, this son could not take the land, by virtue of this remainder; for the particular estate determined before there was any person *in esse*, in whom the remainder could vest[t]. But to remedy this hardship, it is enacted by statute 10 & 11 W. III. c. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is allowed to vest in them while yet in their mother's womb[u 9].

[t] Salk. 228. 4 Mod. 282.

[u] See Vol. I. p. 130.

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is and must be liable, as the remainderman may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. For instance; if there be a lease for life to A., remainder to B. for life; here the remainder to B., although it may possibly never take effect in possession, because B. may die before A., yet, from the very instant of its limitation, it is capable of taking effect in possession, if the possession were to fall by the death of A. It is therefore vested in interest, though perhaps the interest so vested may determine by B.'s death before the possession he waits for may become vacant." (Fearne on Contingent Remainders, 216, 7th ed.).

It may be added, that a vested remainder may be conveyed by the person entitled to it, and limited in particular estates and remainders, just in the same manner as if it were an estate in possession; but a contingent remainder cannot be directly conveyed at common law; although there are indirect means of producing, in particular cases, nearly the same result that a direct conveyance, if it were allowable, would effect. Contingent estates and interests, of whatever nature, may now be passed by will; (stat. 11 Will. 4 & 1 Vict. c. 26); a privilege which it seems did not formerly exist where the contingency was as to the *person* to take. (3 T. R. 88; 2 Mau. & S. 165).

(9) The case of *Reeve* v. *Long*, which is that referred to in the text,

This species of contingent remainders to a person not in being, must however be limited to some one, that may, by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines[w]. As if an estate be made to A. for life, remainder to the heirs of B.; now if A. dies before B., the remainder is at an end; for during B.'s life he has no heir, *nemo est hæres viventis:* but if B. dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B.'s dying before A. is *potentia propinqua*, and therefore allowed in law[x]. But a remainder to the right heirs of B. (if there be no such person as B. *in esse*) is void[y]. For here there must two contingencies happen: first, that such a person as B. shall be born; and secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen), is good, for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name[z]. A limitation of a remainder, to a bastard before it is born,

Potentia propinqua of the person's being *in esse*, when the precedent estate determines, necessary.

[170]

Possibility upon a possibility.

[w] 2 Rep. 51. [x] Co. Litt. 378. [y] Hob. 33. [z] 5 Rep. 51.

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arose on a will; and in the argument for the posthumous son, it was not contended that he could take, *if* his estate was a contingent remainder, but that it was an executory devise, to which the rule did not apply. (See post, p. 173). The statute was passed on account of the dissatisfaction of the judges with the decision of the House of Lords in his favour, a decision grounded rather on the hardship of the case than on legal principles. The statute merely speaks of marriage or other settlements, and is silent as to wills; whether the Lords thought that their decision had settled the law as to wills, and therefore that it was unnecessary, or whether the word was omitted from delicacy, as the insertion of it would have implied that their previous judgment was wrong. It is understood, however, that wills are included in it, or governed by the same rule. The words of the statute being, that the posthumous child shall take "in the same manner" as if born in the lifetime of the parent, he is entitled to the intermediate profits from the death of the parent; whereas, where the birth of a posthumous child divests an estate which has descended on an heir at law, and such child takes by descent, the intermediate heir retains the profits.—[COLERIDGE.] (See 2 Ves. jun. 673; 4 Id. 342; 11 Id. 139; 2 Ves. & B. 367).

is not good[a 10]: for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency[11]. Thus may a remainder be con-

[a] Cro. Eliz. 509.

(10) This rule with respect to illegitimate children is not founded on any notion of the improbability of the event of such children being born, but rather on the policy of the law, and the maxim that a bastard cannot with certainty be ascertained to be the issue of a particular man, and can only take, as such, under a gift made after he has become known by reputation as the child of that man. (17 Ves. 531; 1 Meriv. 153; 1 Sim. & St. 81; 1 Ves. & B. 446).

(11) No writer has ever given an intelligible account of this supposed rule against a "possibility upon a possibility." (See Fearne, C. R. 250). All the light that Mr. Butler could throw upon the subject was conveyed in these words:—that "the expression must not be understood in too large a sense;" and in a reference to the case of *Routledge* v. *Dorril*, (2 Ves. jun. 357), where a trust was held valid, although, before it could take effect, four contingent events must have happened:—that a husband and wife should have a child,—that such child should have a child,—that such last-mentioned child should be alive at the decease of the survivor of his grandfather and grandmother,—and that if such child were a grandson, he should attain twenty-one, if a daughter, attain that age or marry. (Butl. Fearne, C. R. p. 251). It may safely be asserted, that, at the present day, the supposed rule, so far as it is not identical with the rule against perpetuities, to be noticed presently, has no existence.

The Real Property Commissioners, in their Third Report, have the following observations on this doctrine of Lord Coke's:—"It is a mistake to suppose, that at the common law, properly so called, there was any rule against perpetuities. Lord Coke observes, 'A possibility which shall make a remainder good, ought to be a common possibility, and potentia propinqua; as, death, or death without issue, or coverture, or the like. If a lease be made for life, with remainder to the heirs of J. S., this is good; for, by common possibility J. S. may die during the life of the tenant for life; but if at the time of the limitation there is no such person as J. S., but during the life of the tenant for life J. S. is born, and dies, his heirs shall never take.' (2 Rep. 51). This amounts to a double possibility: first, that such a person as J. S. shall be born, which is very uncertain; and secondly, that he shall die during the particular estate, which is another uncertainty grafted upon the former. Now, this has nothing restrictive of alienation in it, since both the common and double possibility must have taken effect, if at all, upon the determination of the particular estate. Indeed, the existence of the rule itself may be considered as extremely doubtful. Lord Chancellor Nottingham observed, 'That there may be a possibility upon a possibility, and that there may be a contingency upon a contingency, is neither unnatural nor absurd in itself; but the contrary rule given as a reason by my Lord Popham in the *Rector of Chedington's case*, looks like a reason of art; but in truth there is no kind of reason in it, and I have known that rule often denied in Westminster Hall.' Modern determinations have established his Lordship's opinion; but we think it advisable that the law should be relieved by a legislative declaration from that doubt, to which it must be considered exposed from the conflicting doctrines of such high authorities."

tingent, on account of the uncertainty of the *person* who is to take it.

A remainder may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As where land is given to A. for life, and in case B. survives him, then with remainder to B. in fee; here B. is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A. and B. it is contingent; and if B. dies first, it never can vest in his heirs, but is for ever gone; but if A. dies first, the remainder to B. becomes vested.

May be limited on an uncertain event.

[171]

Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate, less than a freehold. Thus, if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void[b]; but if granted to A. for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest no where; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void[12].

If freehold, must be limited on freehold.

[b] 1 Rep. 130.

(12) Of the various definitions of a contingent remainder, the following appears to be at once the most exact and the most perspicuous:—"A remainder is contingent when the moment at which it is limited to commence may never happen, or may happen after the expiration of the estate of freehold on which it is expectant." To which may be added this definition of a vested remainder:—"A remainder is vested at any moment, if, in case the preceding estate of freehold were to determine by any means at that moment, the remainder would be capable of taking effect in possession."

These definitions exclude from the class of contingent remainders such a limitation as the following:—To A. for his own life, and after the determination of that estate to B. for his own life;—where, although in a popular sense B.'s estate might be said to be contingent upon his surviving A., since, if he were to die during the continuance of A.'s estate, he could never come into possession; yet this happens not because there is any event to wait for, but because the estate or remainder to B. is already spent and gone, so that the contingency arises out of the event on which the remainder is

Defeated, if precedent estate defeated.

Contingent remainders may be *defeated*, by destroying or determining the particular estate upon which they de-

limited to determine, and not out of the mode of its commencement—which latter is all that is regarded in determining the question of contingency. The common limitation to prevent dower affords a still more striking illustration. "To A. for his own life, and, on the determination of that estate by forfeiture or otherwise*, to B. and his heirs during the life of A., remainder to A., his heirs and assigns." Here, unless A. by forfeiture or some other improbable means, puts an end to his estate in his own lifetime, the estate limited to B. can never take effect in possession; for the only other event which would entitle B., namely, A.'s death, does at the same moment put an end to B.'s estate. Yet since, whenever the previous estate determines, B.'s estate is limited to commence, it is said to be vested in him.

The contingent nature of a remainder, therefore, does not depend upon its amount, extent, or duration, but only on the manner in which it is limited to commence; and hence may be deduced this simple and sure test by which to determine any difficult case: Suppose the remainder in question to be a remainder in fee-simple, and then see whether it is so limited as necessarily to take effect at the moment when, by whatever means, the preceding estate of freehold determines; if it is so limited, it is vested; if not, it is contingent. Applying this test to the two examples given above, they both become a limitation to A. for life, remainder to B. in fee; here (setting aside the possibility of a failure of heirs of B.) B. or his heirs must necessarily take on A.'s death whenever that may happen.

Here it may be remarked, that a remainder which was contingent at the time of its creation, may become vested by subsequent events, before it falls into possession; as, for instance, where land is limited to A. for life, remainder to B. if he shall have attained his majority. Here, while B. is under age, his remainder is contingent, since A. may possibly die or commit a forfeiture during B.'s minority; but, as soon as B. attains the age of twenty-one, his estate becomes vested, though still suspended in point of enjoyment during

* This limitation is most frequently incorrectly worded as follows: "To A. for his life, and after the determination of that estate by forfeiture or otherwise, *in the lifetime of A.*, to B. for the life of A.," which would give a contingent remainder to B.,—contingent, that is to say, on A.'s committing a forfeiture; as will be seen at once if we suppose the limitation to be to B. in fee, instead of for the life of A., in which case, if A. died without committing a forfeiture, B. would take nothing, his estate being to take effect only on the determination of A.'s estate *in A.'s lifetime*. It is very remarkable that Mr. Fearne, to whom we owe the limitations to prevent dower in their most improved form, has himself (as well as his able editor, Mr. Butler) fallen into this error. (See Cont. Rem. p. 347, n., 7th ed.; *Smith* d. *Dormer* v. *Parkhurst*, 17 Vin. 413; *Hooker* v. *Hooker*, Cas. tem. Hardw. 13, overruling *Cordal's case*, Cro. El. 315). In a limitation to trustees to preserve contingent remainders, the error is of less importance, for a reason that will be obvious to the learned reader. It should be added, however, that the contingent nature of the ordinary limitation to trustees to bar dower is denied in an ingenious and well-written article on Remainders in The Penny Cyclopædia, attributed to the pen of Mr. G. Long.

pend, before the contingency happens whereby they become vested [c]. Therefore, when there is tenant for life, with divers remainders in contingency, he may, not only by

[c] 1 Rep. 66, 135.

A.'s life, and therefore still a remainder.

Again, there may be a quasi vesting of a remainder, which is called a vesting subject to be devested. Of this a limitation to A. for life, remainder to all the children of B. as tenants in common in fee, affords an example. Here, if there be a child of B. already in existence, the entire remainder vests in such child; but as soon as another child comes into existence, one moiety of the estate shifts away from the first-born child, and vests in the other, and upon the birth of a third, one third of each of the shares of the two elder children shifts from them to such younger child, and so on until A.'s death. (Fearne, Cont. Rem. 312, 7th ed.).

Mr. Fearne's classification of contingent remainders is so often referred to, that it will be proper to subjoin a brief account of it.

He defines a contingent remainder to be "a remainder limited, so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate;" and under this definition he distinguishes four sorts of contingent remainders.

"First, where the remainder depends entirely on a contingent determination of the preceding estate itself." As, if A. makes a feoffment to the use of B. till C. returns from Rome, and after such return of C., then to remain over in fee. (3 Rep. 20 a).

"Secondly, where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate," or, in other words, "where some uncertain event, unconnected with and collateral to the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder." As, if a lease be made to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life, here the remainder to C. is contingent on an event collateral to the determination of the particular estate. (3 Rep. 20 a; 10 Rep. 85).

"Thirdly, where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it." As, if a lease be made to A. for life, and after the death of A. and M. the remainder to B. in fee. (Pollexf. 57).

"Fourthly, where the person to whom the remainder is limited is not yet ascertained, or not yet in being." As, if a lease be made to A. for life, remainder to the right heirs of J. S.; where, as no one can be heir to J. S. until his death (for nemo est hæres viventis), such remainder is contingent until his death. (Co. Litt. 378). So, if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent, for it is uncertain who will be the survivor. (Cro. Car. 102).

See some comments on this classification, 1 Hayes, Introd. to Conv., p. 335, where the learned author proposes the following definition or description of a contingent remainder: "A legal limitation adapted to confer, on the happening of an uncertain event, an estate of freehold or inheritance, immediately on the natural determination of a preceding legal limitation, contained in the same instrument, of a particular vested estate of freehold or inheritance."

his death, but by alienation, surrender, or other methods destroy and determine his own life-estate before any of those remainders vest, the consequence of which is, that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life-estate, he by that means defeats the remainder in tail to his son: for his son not being *in esse*, when the particular estate determined, the remainder could not then vest; and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases therefore it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines[13]. If therefore his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency. This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffrey Palmer and other eminent counsel, who betook themselves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life[d]: and when, after the restoration, those gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use.

Therefore trustees to preserve contingent remainders necessary.

[172]

Thus the student will observe how much nicety is required in creating and securing a remainder; and I trust he will in some measure see the general reasons upon which this nicety is founded. It were endless to attempt to enter upon the particular subtilties and refinements into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided; neither are they consonant to the design of these elementary

Remainders by will, not controlled by these rules, are called *executory devises*.

[d] See Moor. 486. 2 Roll. Abr. 797, pl. 12. 2 Sid. 159. 2 Chan. Rep. 170.

(13) Infra, p. 177, n. (23). Trustees to support contingent remainders are not essential in copyholds, the lord's estate sufficing. (10 Ves. 282; 16 East, 406).

disquisitions[14]. I must not however omit, that in devises by last will and testament, (which being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice), in these devises, I say remainders may be created in some measure contrary to the rules before laid down: though our lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of *executory devises*, or devises hereafter to be executed.

Executory devises.

An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency[15]. It differs

(14) The student will now be prepared to understand the celebrated rule of law, commonly called *The Rule in Shelley's Case*, on account of the following distinct announcement of it which occurred in that case. (1 Rep. 104 a).—"It is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase." And this is a strict rule of law, which cannot be prevented by any expression of intention to the contrary. Thus, if a limitation is made to Jane Wood *for life*, remainder to B. for life, remainder to C. in tail, remainder to the heirs of Jane Wood; she takes an estate for life with the ultimate remainder to *herself* in fee; and such remainder descending to her heir, would be descendible from him to the heirs ex parte maternâ.

Rule in *Shelley's case*.

To prevent the operation of this rule, it is the practice in settlements where it is desired to confine the ancestor to a life estate, and yet to make the estate descend to his issue, to avoid the use of the word heirs, or any equivalent phrase, and to describe the first generation of issue as children: thus, to A. during his life, and after the determination of that estate to B. and his heirs during the life of A., in trust for A. and his assigns, and to preserve the subsequent contingent remainders, (vide supra, p. 171); and after the determination of that estate, to the first son of A., and the heirs of the body of such first son; remainder to the second son of A., and the heirs of his body; with remainder to the third, fourth, and every other son of the body successively, according to seniority, and the heirs of their respective bodies; remainder to all the daughters of A., and the heirs of their bodies as tenants in common, with cross remainders between them. Here the estate is limited to be enjoyed in nearly the same manner as if it had descended from A., and yet by avoiding any limitation to his heirs as such, the operation of the rule in Shelley's case is prevented, and A. takes no estate of inheritance.

For a further account of this rule, upon which a vast quantity of intricate learning depends, see Fearne, C. R. 76; Hayes's "Principles for expounding Dispositions to Ancestor and Heirs in Tail;" 1 Hayes's Introduction to Conveyancing, p. 542.

(15) This definition is too large, for it includes contingent remainders given

from a remainder in three very material points: 1. That it
[173] needs not any particular estate to support it. 2. That by it a fee-simple, or other less estate, may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

No particular estate necessary to support them.

1. The first case happens when a man devises a future estate to arise upon a contingency; and, till that contingency happens, does not dispose of the fee-simple, but leaves it to descend to his heir at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage: here is in effect a contingent remainder, without any particular estate to support it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise [e]. For since by a devise a freehold may pass without corporal tradition or livery of seisin, (as it must do if it passes at all), therefore it may commence *in futuro;* because the principal reason why it cannot commence *in futuro* in other cases, is the necessity of actual seisin, which always operates *in præsenti*. And since it may thus commence *in futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows,

[e] 1 Sid. 153.

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by will, which are subject in all respects to the same rules which govern the like limitations in deeds, while the term "executory devise" is properly used to designate those limitations, which the law allows to be made in a will, though contrary to the rules of limitation in conveyances at common law. The reason of this greater laxity is, that the Statute of Wills, (p. 375), by enabling a testator to vest the freehold at his death in whom he pleased, without any public act or actual tradition of seisin, struck at the very root of the common-law rules as to future estates, which were founded on the assumption that actual delivery of the seisin was necessary to pass a freehold estate, and rendered them inapplicable to dispositions by will. Had the courts adopted a different rule of construction, and required that all future estates given by will should be supported by the seisin of the first devisee, they would have put it in the power of such particular devisee to defeat all the ulterior limitations, by colluding with the heir, and refusing to take upon himself the devised estate.

An executory devise is thus defined by a distinguished writer:—"Every devise of a future interest which is not preceded by an estate of freehold created by the same will, or which, being so preceded, is limited to take effect before or after and *not at* the expiration of such prior estate of freehold, is an executory devise." (1 Jarm. Wills, 778).

that such an executory devise, not being a present interest, cannot be barred by a recovery, suffered before it commences [f] [16].

2. By executory devise a fee, or other less estate, may be limited after a fee. And this happens where a devisor devises his whole estate in fee, but limits a remainder [17] thereon to commence on a future contingency. As if a man devises land to A. and his heirs; but if he dies before the age of twenty-one, then to B. and his heirs: this remainder, though void in a deed, is good by way of executory devise [g]. But in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years, for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors [h]: because by perpetuities, (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation [i]), estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme-covert, as shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son: and this hath been decreed to be a good executory devise [k] [18].

2. Executory devise may limit fee or less estate after a fee.

[174]

Must take effect within a certain period.

[f] Cro. Jac. 593. [g] 2 Mod. 289. [h] 12 Mod. 287. 1 Vern. 164.
[i] Salk. 229. [k] Forr. 232.

(16) But if the devise was to a person sui juris, and he joined in the recovery as vouchee, his right, it seems, was barred, (Cro. Jac. 393); and executory limitations or devises limited upon an estate tail, were destructible by a recovery suffered by the tenant in tail, and may now be discharged by means of the enrolled conveyance which is used in lieu of a recovery. (Stat. 3 & 4 Will. 4, c. 74).

(17) The estate here contemplated is an estate to arise in defeazance of the preceding fee-simple, and cannot properly be called a remainder, as our author has himself informed us in another place. (Ante, p. 164).

(18) This is the famous rule against perpetuities, unknown, it seems, to the antient common law, (ante, p. 170, n. (11)); and yet purely a creation of

Rule against perpetuities.

3. May limit over a term of years in remainder over.

3. By executory devise a term of years may be given to one man for his life, and afterwards limited over in re-

Rule against perpetuities.

the judges, unaided by any act of Parliament, and indeed directly opposed to the spirit of the Statute de Donis. The avowed object of the rule is, to favour commerce and the circulation of property, by preventing the right of absolute disposition from being tied up or restrained beyond a certain period; and it applies, therefore, to every description of property, whether real or personal, to every mode of limitation, and to every kind of interest or mode of enjoyment, whether legal or equitable. (See Butl. Co. Litt. 379. b.).

The rule which has been already discussed, requiring a vested estate of freehold to support a contingent remainder, and which sprung, as we have seen, from feudal principles, contained no doubt the first germ of the law against perpetuities, although the latter has sometimes, by a strange perversity, been referred to as the foundation of the former. (3rd Real Prop. Rep. p. 24). It being necessary that a remainder should take effect the moment of the expiration of some vested estate of freehold, and no remainder being allowable after a fee-simple, it followed, that every remainder must be limited so as to take effect, if at all, upon the expiration either of a life estate or of an estate tail. When, therefore, executory limitations by way of use, or of devise, were introduced, and were found to be free from the restrictions by which common-law estates were fettered, and to be capable of taking effect, and of defeating vested estates, at the most remote period; the judges found it necessary to curb this license, and framed a rule which denied validity to these limitations, unless, in analogy with remainders at common law, they were limited to take effect at the expiration of some life in being at the time of their creation, or were preceded by a vested estate-tail; so that, in effect, the power of disposing of the inheritance could scarcely fail of falling to some person or persons before the expiration of twenty-one years after the death of some person who was living when the limitations were made. Thus, they allowed effect to such limitations as these:—"To A. in fee, but upon the death of B. to B.'s male heir in fee." "To A. and the heirs of his body; but if B. should have a great grandson who should attain the age of twenty-one, to such great grandson in fee." In the first example, B.'s male heir must take upon B.'s death; and though he might then be incompetent on account of infancy, his power of alienating the estate could not be suspended beyond the further period of twenty-one years. It is true he might die before his majority, and there might be a succession of infant heirs, tying up the estate for an indefinite time; but of this inconvenience, to which every estate is necessarily liable, the law takes no notice. In the second instance, the majority of B.'s great grandson might possibly not happen for more than a century after the death of every person living at the time of making the limitation; but inasmuch as A. might at any time, by suffering a common recovery, defeat this limitation, it cannot operate to prevent alienation; and is therefore allowed, if left undefeated until the time arrives, to take effect. (2 Br. C. C. 215; 6 East, 58).

"The rules," said Lord Kenyon, (in *Long* v. *Blackall*, 7 T. R. 102), "respecting executory devises, have conformed to the rules laid down in the construction of legal limitations; and the courts have said that the estate shall not be unalienable by executory devise for a longer time than is allowed by the limitations of a common-law conveyance." But we shall see that this analogy has not been strictly

mainder to another, which could not be done by deed; for by law the first grant of it, to a man for life, was a

observed; and that by means of an executory devise, or a springing use, estates may be tied up from alienation for a much longer period than was allowed by the common law.

The period of twenty-one years, which was allowed to be added to the duration of an existing life, was originally allowed (or supposed to be allowable) only where it was actually the period of the infancy of the person who was to take at its expiration (Cas. tem. Talb. 228); but after some fluctuation of opinion, the rule became settled that the vesting might be suspended during a gross period of twenty-one years, following the decease of any person in being, irrespective of the minority of the taker or of any other person. This was decided in the case of *Lloyd* v. *Carew*, (Show. P. C. 137; Pr. Ch. 73); and was finally settled by the decision in *Cadell* v. *Palmer*, (1 Cl. & Fin. 372; 3 Moo. & Sc. 571). In that case, the judges stated the law to be, that a "limitation by way of executory devise is not void as too remote or otherwise, although it is not to take effect until after the determination of one or more lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross and without reference to the infancy of any person who is to take under such limitation, or of any other person." A very remarkable effect of this decision, which, though noticed in the argument, does not seem to have been considered by the judges, was, that in many cases the power of alienation might be postponed, by reason of the infancy of the ultimate taker, during a further period of twenty-one years, in addition to the gross term of twenty-one years allowed by the rule. And when this effect of the doctrine in *Cadell* v. *Palmer* is considered, it may well be doubted whether that decision was not an unwarrantable extension of the old rule. (See Sugd. Gilb. on Uses).

Rule against perpetuities.

A child is considered to be for most purposes, (and, among them, for the purpose of taking under a limitation by deed or will,) in existence, even before its birth, and while *en ventre sa mere;* and hence, the period of gestation is often, but incorrectly, added to the twenty-one years in the statement of the rule. It is quite clear, however, and was expressly declared by the judges in the case of *Cadell* v. *Palmer*, that the nine months, or ordinary period of gestation, cannot be taken independently of the actual existence of the proposed taker *en ventre sa mere*, and added to the period of twenty-one years, as a term in gross. The twenty-one years is the limit, and the period of gestation is only allowed in those cases where the gestation exists. It seems that a child *en ventre sa mere* may be named as the life or one of the lives, upon the dropping of which the term of twenty-one years is to commence.

In the same case, it was determined that the life of any person, (or, which is the same thing, of the survivor of any number of persons); although wholly unconnected in point of interest or relationship with the settlement, may be inserted into the period. In the will upon which that case arose, the term was limited to commence after the death of the survivor of twenty-eight persons. To this there is no objection; because, in the words of Lord Talbot, "all the candles, being lighted up at once, are all burning at the same time." (3 P. W. 264).

Lastly, it is to be observed, that, in applying the rule, the courts do not wait to see whether in fact the executory limitation takes effect within the time allowed; but they regard all limi-

total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term of years[1]. And, at first, the courts were tender, even in the case of a will, of restraining the devisee for life from alienating the term; but only held, that in case he died without

[1] 8 Rep. 95.

Rule against perpetuities.

tations as void ab initio, which are not so framed as to take effect of necessity within the legal period, if at all. (2 Mer. 363).

The rule against perpetuities did not impose any greater restraint upon the suspension of the enjoyment of the income and profits of property, than it did upon that of the vesting of the title to the corpus of the property itself: so that a trust for the investment and accumulation of the income of an estate during a life or lives in being, and twenty-one years afterwards, was perfectly valid. (*Thellusson* v. *Woodford*, 4 Ves. 227). The hardship of the trusts, which in that case were established, to the immediate family and descendants of the testator, and the apprehended danger to the constitution if such immense accumulations as might be made under trusts of that nature were allowed, induced the legislature to pass the famous Thellusson Act, 39 & 40 Geo. 3, c. 98, which enacted, "that no person should, after the 28th July, 1800, by any deed or will, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, &c., or during the minority or respective minorities of any person or persons who shall be living or en ventre sa mere at the time of the death of such grantor, devisor, or testator; or during the minority or respective minorities only of any person or persons, who, under the uses or trusts of the deed, &c., directing such accumulations, would, for the time being, if of full age, be entitled to the rents, issues, profits, and produce of such property so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void; and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to accumulate contrary to the provisions of this act, go to, and be received by, such person or persons as would have been entitled thereto, if such accumulation had not been directed."

Accumulation of income:—Thellusson Act.

Sect. 2.—"Provided that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if the act had not passed."

The extreme inaccuracy and obscurity of the act have made it necessary to cite it verbatim; since any attempt to state its effect in other words would probably have failed. An able dissertation on its construction, as well as an interesting account of the Thellusson trusts, to which the statute owes its origin, will be found in Mr. J. F. Hargrave's Treatise on the Thellusson Act.

exerting that act of ownership, the remainder over should then take place[m]: for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards, it was held[n], that the devisee for life hath no power of aliening the term, so as to bar the remainder-man: yet, in order to prevent the danger of perpetuities, it was settled[o], that though such remainders may be limited to as many persons successively as the devisor thinks proper, yet they must all be *in esse* during the life of the first devisee, for then all the [175] candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest: and it was also settled, that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee[p] [19].

Thus much for such estates in expectancy, as are created by the express words of the parties themselves; the most intricate title in the law [20]. There is yet another species, which

[m] Bro. tit. *Chatteles*, 23. Dyer, 74.
[n] Dyer, 358. 8 Rep. 96.
[o] 1 Sid. 451. [See 3 Mer. 194.]
[p] Skinn. 341. 3 P. Wms. 258.

(19) This statement of the law as to executory bequests of terms of years is erroneous; it is now well settled, that such limitations are restricted only by the rule against perpetuities, and that a term may be given over by way of executory devise at any time before the expiration of twenty-one years after a life in being. (1 Vern. 234, 304; 2 Id. 151; 2 P. Wms. 421; 3 Atk. 282; 19 Ves. 547).

(20) "We should carefully distinguish between, 1. a condition; 2. a remainder; and 3. a conditional limitation.

"1. We have seen that a *condition* defeats the whole estate; that none but the donor or the heir can take advantage of or enter for the breach of it; and that when he enters, he is in as of his old estate. Such is the case put by Littleton of a feoffment in fee, reserving a yearly rent, with a condition, that if the rent be behind, it shall be lawful for the feoffor and his heirs to enter.

"2. A *remainder* is defined by Lord Coke (1 Inst. 143) to be a remnant of an estate in lands or tenements expectant upon a particular estate, created together with the same at the same time, so that it waits for and only takes effect in possession on the natural expiration or determination of the first estate; as if a man limits an estate to A. for life, and after his decease to B. in fee, this is a remainder: it does not defeat, but it expects the natural end and expiration of the first estate limited to A. for his life; and when that event happens, not the heir but a stranger has the advantage of it.

"3. A *conditional limitation* partakes of the nature both of a condition and a remainder. It is to be observed, that, at the common law, whenever either the whole fee, or a particular estate, as an estate for life or in tail,

is created by the act and operation of the law itself, and this is called a reversion.

III. Estates in reversion.

III. An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him[q]. Sir Edward Coke[r] describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years,

[q] Co. Litt. 22. [r] 1 Inst. 142.

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was first limited, no condition or other quality could be annexed to this prior estate, which would have the *double effect* of *defeating* the estate, *and* passing the land to a stranger: for, as a remainder, it was void, being an abridgment or defeazance of the estate first limited; and as a condition, it was void, as no one but the donor or the heirs could take advantage of a condition broken, and the entry of the donor or his heirs unavoidably defeated the livery upon which the remainder depended. On these principles it was impossible by the old law to limit by deed, if not by will, an estate to a stranger, upon any event which went to abridge or determine an estate previously limited. But the expediency and utility of such limitations, assisted by the revolution effected in our law by the Statute of Uses, at length forced them into use, in spite of the maxim of law, that a stranger cannot take advantage of a condition. These limitations are now become frequent, and their mixed nature has given them the appellation of conditional limitations. They so far partake of the nature of conditions, as they abridge or defeat the estates previously limited; and they are so far limitations, as, upon the contingency taking place, the estate passes to a stranger. Such is the limitation to A. for life, in tail or in fee, provided, that, when C. returns from Rome, it shall from thenceforth remain to the use of B. in fee. (See Fearne, C. R. 14, 7th ed.)" (Butl. 2 Co. Litt. 203. b. See 3 Ad. & El. 3. 897).

Mr. Butler in the above passage states the common-law restrictions too strongly. Where the first limitation was of the fee-simple, it was impossible, by any contrivance, to provide that the land should go to a stranger on a contingency, because there could be no remainder after a fee-simple; so that the most that could be done was to reserve a power of re-entry to the grantor and his heirs. But if the first estate was for life or in tail, a remainder might be limited to take effect on the intended contingency, care being taken to incorporate such contingency in limiting the particular estate. Thus a feoffment, habendum to A., so long as he should live and C. should remain at Rome, and in case C. should return from Rome, then to B. and his heirs, gave a good contingent remainder to B., though not so effectual as a conditional limitation by way of use, because destructible by A. But if the limitation had been to A. for his life, but in case C. should return from Rome, then immediately to C. and his heirs, this was void, as an attempt to defeat or abridge the preceding estate.

or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in præsenti*, though taking effect *in futuro*.

Derived from feodal constitution.

The doctrine of reversions is plainly derived from the feodal constitution. For, when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services; then, on his death, or the failure of issue male, the feud was determined, and resulted back to the lord or proprietor, to be again disposed of at his pleasure. And hence the usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion[s]. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by *special* words: but by a *general* grant of the reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*: for the maxim of law is, "*accessorium non ducit, sed sequitur, suum principale*[t]."

[176]

Distinction between remainders and reversions.

These *incidental* rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one, seised of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion[u], to which rent and fealty shall be incident; and which shall only descend to the heirs of his

[s] Co. Litt. 143. [t] Ibid. 151, 152. [u] Cro. Eliz. 321.

father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done[w]: for it is the old estate, which was originally in him, and never yet was out of him. And so likewise, if a man grants a lease for life to A., reserving rent, with reversion to B. and his heirs, B. hath a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of A.'s estate[x 21].

[177]

Remainderman's right to compel appearance of tenant for life.

In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the statute 6 Ann. c. 18, that all persons on whose lives any lands or tenements are holden, shall (upon application to the Court of Chancery and order made thereupon), once

[w] 3 Lev. 407. [x] 1 And. 23.

(21) There may be a reversion for a mere term of years, and that either at the moment of the creation of the particular estate, or by matter subsequent. Thus, if A., tenant for life or in fee, demises to B. for years or for life, at a rent, a freehold reversion remains in or reverts to A., to which the rent is incident; if he then demise the same land (i. e. his reversion in it) to C. for years, C. instantly acquires the reversion and the right to the rent for that term, and may take a surrender of the particular estate of B., provided it is not a freehold; for, by analogy to the rule that a freehold estate will not merge in a remainder for years, it seems that a reversioner for years cannot take a surrender of a freehold estate.

Again, a tenant for years may demise the lands comprised in his term for a shorter term, and then he will have a reversion for years, in which the derivative term will merge if they come together in the same person. Where a tenant for years wishes substantially to part with the term, but at the same time to remain tenant to his own landlord, and to stand in the relation of reversioner to the intended termor; or where the latter does not choose to take upon himself the responsibility of assignee of the original lease, it is common for the termor to demise the premises comprised in the term, to hold to the lessee for all the residue of the term *wanting the last day or last two days thereof*, the effect of which qualification is to preserve a reversion in the mesne lessor, and to prevent the sub-lessee from becoming tenant to the original lessor.

But in these, as in most other assurances, the law regards rather the substance than the form; and a deed purporting to be a demise or lease for a term as long as the subsisting residue of the original term out of which the demise is intended to operate, will have the effect of an assignment, creating no tenancy between the parties, and leaving no reversion in the grantor. (Dougl. 178; 3 Moo. & P. 57; 3 B. & Ad. 586). See an ingenious argument for the existence of a mesne tenure in such a case, 5 Man. & Ry. 157, n.

in every year, if required, be produced to the court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living[22].

Doctrine of merger.

Before we conclude the doctrine of remainders and reversions, it may be proper to observe that whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate[y], the less is immediately annihilated; or in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater[23]. Thus

[y] 3 Lev. 437.

(22) The student may be curious to know upon whom the order spoken of in the text is to be made. It is to be made, on the ex parte application of any person having any claim to *lands* in remainder, reversion, or expectancy, after the death of any minor, married woman, or other person, upon the guardian, trustee, husband, *or other person suspected of concealing the death*. Upon affidavit that the cestui que vie is beyond seas, the reversioner may send over persons to view him. Restitution is to be made, if, after possession by the reversioner, the cestui que vie appears to have been alive. (See 6 Ves. 512; 4 Myl. & Cr. 11).

At common law, a person who has not been heard of for seven years was presumed to have died, (Dy. 185); and that period was adopted in the statute 1 Jac. 1, c. 11, against bigamy; and by the stat. 19 Car. 2, c. 6, it is enacted, that, in actions by grantors of copyholds for lives, and by other reversioners expectant on leases for lives, the death of any person on whose life such grant or lease was made, shall be presumed, if such person shall remain beyond seas, or elsewhere absent himself in this realm, by the space of seven years together; unless he is proved to be living. It is now the rule in most cases (see, as to legacies, 3 Br. C. C. 510; 6 Ves. 606; 8 Sim. 443) to presume the death of a person who has not been heard of during seven years. (See 6 East, 81; 4 B. & Al. 433; 4 Nev. & M. 341). But there is no presumption that the death took place at the beginning, in the middle, or at the end of the seven years. A presumption as to the exact time of death can only arise from special circumstances. (2 Mee. & W. 910; 1 You. & C. N. C. 117. See 1 Stark. 121; 3 Br. C. C. 510; 1 Mer. 308; Park on Insurance, 644).

(23) This account of merger is very imperfect. Merger is the acceleration of an estate in remainder or reversion by the destruction of the particular estate; and the estate in which the lesser estate is to drown or merge, must stand to it in the relation of an immediate remainder or reversion. Thus, if A. is tenant for life, remainder to B. for years, and A. conveys his estate to B., or B. assigns his term to A., no merger takes place, because the particular estate is greater in amount of interest than the remainder; but if A. is tenant for years, remainder to B. for life, in tail, or in fee, then upon the two estates coming together, either in A. or B., or in a third person, the lesser estate for years merges in the freehold remainder, and the latter is immediately accelerated. An estate in remainder is as capable of merger as an

if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is

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estate in possession. Thus, if A. is tenant for life, remainder to B. for his life, remainder to C. in fee, and B. conveys his life estate to C., or the fee-simple in C. descends upon or is conveyed to B., the life estate merges. But merger can only take place between estates in *immediate* succession, the particular estate can only drown in that estate which, if the particular estate and all estates preceding it were at an end, would be the estate in possession. Therefore, in the last example, if A. were to convey his life estate to C. there would be no merger, but C. would be tenant for the life of A. in possession, with remainder in fee after the death of B. But if the intermediate estate in B. were removed, merger would take place; so that if B. died after the conveyance to C., or himself conveyed his own estate to C., the estate for A.'s life would merge in the remainder in fee, which would then be immediately expectant upon it. A remainder for years, however, interposed between two estates of freehold, will not prevent their merger, because the possession of the termor has nothing to do with the freehold. (1 Salk. 254; vide ante, p. 167, n. (7)).

It is laid down in the text that merger is the drowning a lesser estate in a greater, but whether merger may not take place between estates of equal amount or value in the eye of the law is not satisfactorily settled. An estate for one's own life is considered to be an estate of greater amount than one pour autre vie, (Co. Litt. 273. b.), though it would, perhaps, be impossible to discover the ground of this distinction; and hence it appears to be settled, that an estate pour autre vie uniting in the same person with an immediate remainder or reversion for his own life will merge in the latter; but, according to the old authorities, an estate for one's own life will not merge in an estate pour autre vie, nor will even one estate pour autre vie merge in another. From these distinctions, if well founded, the following curious result would flow, that if lands were limited to A. for his own life, remainder to B. for his own life, and A. conveyed his estate to B., it would merge; but if B. conveyed his estate to A. there would be no merger; whereas, if the limitation were to A. for the life of B., remainder to B. for the life of A., merger would not happen upon the union of the two estates in A. or in a stranger, but would happen if they came together in B. These distinctions, however irrational, appear to be established by the books. Thus it is laid down, that if a lease be made to A. for the life of B., without impeachment of waste, with remainder to A. for his own life, he is punishable for waste, the prior estate being merged and the privilege annexed to it gone; but if the first estate sans waste had been to him for his own life, and the remainder to him pour autre vie, it had been different. (Godb. 52). Mr. Preston, admitting that an estate pour autre vie is less in quantity than an estate for one's own life, asserts that merger may take place between estates equal in quantity, (Prest. Conv. vol. 3, p. 222 et seq.); and this opinion is supported by the authorities which shew that a conditional fee may merge in another, or in the reversion or possibility of reverter, (3 Prest. Conv. 258; 9 Rep. 138; Cro. Car. 476; 2 Ves. sen. 354; 5 Scott, 790); that an estate by elegit or statute may merge in another, (2 Vent. 231; Collis, P. C. 64); and that a term of years may merge in a reversion even for a shorter term of years. (Cro. El. 302; 6 Madd. 66; 4 Bac. Ab. 875, Gwill. ed.). It is opposed, however, in a recent work of merit, on the authority chiefly of a dictum in *Bowles's case*, (11 Rep. 79, 83, 153; 1 Roll. 177), and another in Co. Litt. 299. b.

merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and

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(See Bissett on Estates for Life, 182 et seq.; and see *Hurd* v. *Foy*, 2 Roll. 485; 15 Vin. Ab. 315, contrà). It is not settled whether an estate for years will merge in a remainder for years, and it would not, perhaps, be difficult to support a distinction between a remainder and a reversion for this purpose. (See Co. Litt. 273. b.; 3 Prest. Conv. 201). An interesse termini, being no estate, cannot be the subject of merger, or prevent it. (5 B. & Cr. 111; Dy. 112).

If a particular estate is created, and the immediate remainder is limited for a greater (or equal?) estate to the same person, merger will happen in the same manner as if the estates, having been originally limited to different persons, had subsequently come together, (Godb. 52), but with two exceptions: first, where a contingent estate is limited between the particular estate and remainder; and, secondly, where either the particular estate or the remainder is limited to the person in question *jointly* with some other person. Thus, where the limitations were to A. for life, and if he should die without issue living at his death to B. in fee, but, if A. had issue living at his death, to A. and his heirs, it was held that A.'s life estate did not merge in the remainder to him in fee. (1 Lev. 11). But if the life estate had been to A., and the remainder in fee to C., with an intermediate contingent limitation, and the estates of A. and C. had come together by any means in the same person before the happening of the contingency, those estates would have united, and for ever excluded the contingent estate. And even where the two estates were originally limited to the same person, the interposed contingent limitation is only protected from destruction while they remain in that person; if he should convey his whole estate to a stranger, merger would instantly take place, to the exclusion of the contingent estate. In order to prevent this, it is the practice in all settlements, where there are contingent limitations, to insert a vested limitation to trustees before each contingent limitation, in trust to preserve the contingent estates, such interposed vested estate effectually preventing the union of the vested estates on each side of it, unless the trustee, in breach of his trust, should lend his assistance. To illustrate the second exception, suppose a limitation to A., B., and C. jointly, for the life of the survivor of them, with remainder in fee to A.; here is no merger even as to one-third; but if the remainder in fee had been to D., and D. had conveyed his fee to A., there would instantly have been a merger as to one-third, so that B. and C. would have been jointly seised of two-thirds for the life of the survivor of A., B., and C., and A. would have been seised in common with them of one-third in fee-simple in possession, and would have also been seised of the other two-thirds in remainder in fee. (2 Rep. 60).

Another exception to the general doctrine of merger, which seems to be better supported by authority than by principle, is where the two estates come together by the same assurance; as, if A. is tenant for life with remainder to B. for life in fee conditional (or for any estate less than an absolute fee-simple, for this seems to be material), and A. and B. by the same assurance convey their respective estates to C., here there is no merger. (1 Rep. 77; Hob. 273; 3 Prest. Conv. 409).

Where the estates are held in different rights, that is to say, where their union in the same person is not entirely the act of the parties, but partly at least the act of the law, merger will not generally take place, as is noticed in

the same right; else, if the freehold be in his own right, and he has a term in right of another (*en auter droit*), there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife[z]. An estate-tail is an exception to this rule: for a man may have in his own right both an estate-tail and a reversion in fee; and the estate-tail, though a less estate, shall not merge in the fee[a]. For estates-tail are protected and
[178] preserved from merger by the operation and construction, though not by the express words, of the statute *de donis:* which operation and construction have probably arisen upon this consideration; that, in the common cases of *merger* of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate[b]. But, in an estate-tail, the case is otherwise: the tenant for a long time had no power at all over it, so as to bar or to destroy it, and now can only do it by certain special modes, by a fine, a recovery, and the like[c]: it would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue; and

[z] Plowd. 418. Cro. Jac. 275. Co. Litt. 338.

[a] 2 Rep. 61. 8 Rep. 74.

[b] Cro. Eliz. 302.

[c] See page 116.

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the text, but there are many niceties and difficulties connected with this doctrine, for a discussion of which the student is referred to the works of Mr. Preston and Mr. Bissett already referred to. It may be here observed, that, as the law does not take notice of trusts, if a man is seised of one estate for his own benefit, and of the other in trust for a third person, the trust will not prevent merger. (3 Swanst. 608).

hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee [24].

(24) So, if the husband has the term in his own right, and the inheritance descend upon his wife, (Cro. Jac. 275); but whether, if the term had been possessed by the husband in right of his wife, it would have merged in the inheritance descended upon her, is more doubtful. (3 Prest. Conv. 303). The two estates would then have been held in the same right, but yet with a difference, one of them being absolutely in the husband's power, the other not. If the husband, having the term in right of his wife, purchase the reversion, the former is merged. (4 Leon. 37).

CHAPTER XII.

OF ESTATES IN SEVERALTY, JOINT TENANCY, COPARCENARY, AND COMMON.

Number of owners of an estate.

WE come now to treat of estates, with respect to the number and connexions of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways: in severalty, in joint-tenancy, in coparcenary [1], and in common.

I. In severalty.

I. He that holds lands or tenements in *severally*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estates, in which there are always a plurality of tenants.

II. In joint-tenancy.

II. An estate in *joint-tenancy* is where lands or tenements are granted to two or more persons, to hold in fee-

(1) An estate in coparcenary, however, must be an estate of inheritance. (See p. 188). It would seem that gavelkind lands limited to the heirs as special occupants pour autre vie, would descend to the common-law heir. (Vide infra, pp. 240, n., 258, n.)

simple, fee-tail, for life, for years, or at will. In consequence of such grants an estate is called an estate in joint-tenancy [a], and sometimes an estate in *jointure*, which word, as well as the other, signifies an union or conjunction of interest; though in common speech the term *jointure* is now usually confined to that joint estate, which, by virtue of the statute 27 Hen. VIII. c. 10, is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower [b]. [180]

In unfolding this title, and the two remaining ones, in the present chapter, we will first inquire, how these estates may be *created;* next, their *properties* and respective *incidents;* and lastly, how they may be *severed* or *destroyed.*

1. How created.

1. The *creation* of an estate in joint-tenancy, depends on the wording of the deed or devise, by which the tenants claim title: for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects [2]. For,

2. Properties.

2. The *properties* of a joint estate are derived from its unity, which is fourfold; the unity of *interest,* the unity of *title,* the unity of *time,* and the unity of *possession;* or, in other words, joint-tenants have one and the same interest,

[a] Litt. § 277.

[b] See page 137.

(2) If the nature of the thing granted, or the character of the grantees is repugnant to a joint-tenancy, the grantees will take in common. "If a corody be granted to two men and their heirs, in this case, because the corody is uncertain, and cannot be severed, it shall amount to a several grant to each of them of one corody; for the persons be several, and the corody is personal." (Co. Litt. 190. a.). So, if lands be given to two bishops and their successors, they take in common, "because they are seised in several rights, for the one bishop is seised in the right of his bishopric of the one moiety, and the other in right of his bishopric of the other moiety, and so by several titles, and in several capacities; whereas joint-tenants ought to have it in one and the same right and capacity, and by one and the same joint title." (Id.).

accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

Unity of interest.

First, they must have one and the same *interest*. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; [181] one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail[c]. But if land be limited to A. and B. for their lives, this makes them joint-tenants of the freehold; if to A. and B. and their heirs, it makes them joint-tenants of the inheritance[d] [3]. If land be granted to A. and B. for their lives, and to the heirs of A.; here A. and B. are joint-tenants of the freehold during their respective lives, and A. has the remainder of the fee in severalty[4]: or if land be given to A. and B., and the heirs of the body of A.; here both have a joint estate for life, and A. hath a several remainder in tail[e]. Secondly, joint-tenants must also have an unity of *title*: their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin[f]. Joint-tenancy cannot arise by descent or act of law; but merely by purchase, or acquisition by the act of the party: and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. Thirdly, there must also be an unity of *time*; their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A.

Unity of title.

Unity of time.

[c] Co. Litt. 188. [d] Litt. § 277. [e] Ibid. § 285. [f] Ibid. § 278.

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(3) Lord Coke says, that if a rent-charge of 10*l.* be granted to A. and B. to have and to hold to them two, viz. to A. till he be married, and to B. till he be advanced to a benefice, they are joint-tenants in the meantime, notwithstanding the limitations; and if A. die before marriage, the rent shall survive to B., but if A. had married, the rent should have ceased for a moiety, et sic e converso, on the other side. (Co. Lit. 180. b.; 2 Cruise, Digest, 498).—[CHITTY.]

(4) This is not quite so, the passage in Littleton is, "If lands be given to two, and to the heirs of one of them, this is a good jointure, and the one hath a freehold and the other a fee-simple." And in his commentary Coke says, that he who has the fee cannot grant it away as a remainder, distinct from his life estate. (See 2 Rep. 61).

and B.; or a remainder in fee to A. and B. after a particular estate; in either case A. and B. are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A. and B.; and during the continuance of the particular estate A. dies, which vests the remainder of one moiety in his heir: and then B. dies, whereby the other moiety becomes vested in the heir of B.: now A.'s heir and B.'s heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another [g]. Yet where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times [h]: [182] because the *use* of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation [5]. Lastly, in joint-tenancy there must be an unity of *possession*. Joint-tenants are said to be seised *per my et per tout*, by the *half* or *moiety*, and by *all:* that is, they each of them have the entire possession, as well of every *parcel* as of the *whole* [i 6]. They have not, one of them, a seisin of one half or moiety, and the other of the other

Unity of possession.

[g] Co. Litt. 188. [h] Dyer, 340. 1 Rep. 101. [i] Litt. § 288. 5 Rep. 10.

(5) See Fearne, C. R. 312; Harg. Co. Litt. 188. a.). Where lands were devised to a woman and her children, begotten or to be begotten by W. A., and their heirs for ever, it was held that she and all her children took as joint-tenants, and it was no objection that by this means the several estates might commence at different times. (2 Stra. 1172; 2 Cruise, 503. See also 2 B. C. C. 233; Sugd. Gilb. Uses, 134; Fearne, C. R. 312, 9th ed.).

(6) This explanation gives no effect to the word *my*, which does not refer, as Blackstone says, to the possession of every *parcel*, but expresses that, though each has the seisin of the whole, he has dominion for the purpose of alienation over a part only. (Co. Litt. 186. a.). *My* or *mie* is a contraction of moitié, the half or one of several equal parts,—coæqua vel media pars (Howel, Interpret. *Moyety*); and in Shakspeare's time, the word was frequently used to denote any portion of a thing, as, where Hotspur calls his third share a moiety—"Methinks my moiety, north from Burton here,—In quantity equals not one of yours." (Hen. 4, pt. 1, act 3, scene 1). Again, in dedicating The Rape of Lucrece to the Earl of Southampton, Shakspeare uses the word in the sense of a small portion: "The love I dedicate to your Lordship is without end, whereof this pamphlet without beginning is but a superfluous moiety."

moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety[j]. And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my:* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor[k] 7.

Properties of a joint-tenancy.

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint reversion[l]. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate[m]. On the same reason, livery of seisin, made to one joint-tenant, shall enure to both of them[n]: and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both[o]. In all actions also relating to their joint estate, one joint-tenant can-

[j] *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.* Bract. l. 5, tr. 5, c. 26.

[k] Litt. § 665. Co. Litt. 187. Bro. Abr. t. *Cui in vita*, 8. 2 Vern. 120. 2 Lev. 39.

[l] Co. Litt. 214.

[m] Ibid. 192.

[n] Ibid. 49.

[o] Ibid. 319, 364.

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(7) That is to say, if the estate is given to them jointly,—for if it be given to them as tenants in common, they will take in that manner like other persons. (Co. Litt. 187. b.; 1 Prest. Est. 132; 2 Hare, 54). And the estate by entireties may be an estate in tail or fee. "Also, if a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law, in their right, but the moiety, and the third person shall have as much as the husband and wife, viz. the other moiety." (Litt. s. 291). The application of this rule depends much on the grammatical construction of the gift; a gift to A. *and* B. his wife, and C., or a gift to A. and B. and C. his wife, comes within the rule laid down by Littleton; but a gift equally between A., B., C. and D. his wife, is a gift of one fourth to each individual. (2 Hare, 54). But, as between themselves, the husband and wife perhaps take their shares by entireties. (See 5 T. R. 652).

not sue or be sued without joining the other [p][8]. But if two or more joint-tenants be seised of an advowson, and they present different clerks, the bishop may refuse to admit either: because neither joint-tenant hath a several right of patronage, but each is seised of the whole; and if they do not both agree within six months, the right of presentation shall lapse. But the ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed; which is no more than he otherwise would be entitled to do, in case their disagreement continued, so as to incur a lapse: and, if the clerk of one joint-tenant be so admitted, this shall keep up the title in both of them; in respect of the privity and union of their estate [q]. Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land [r]; for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other; as to let leases [9], or to grant copyholds [s]: and if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by construction of the statute Westm. 2, c. 22 [t]. So too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver [u], yet now by the statute 4 Ann. c. 16, joint-tenants may have actions of account against each

[183]

[p] Co. Litt. 195.
[q] Ibid. 186.
[r] 3 Leon. 262.
[s] 1 Leon. 234.
[t] 2 Inst. 403.
[u] Co. Litt. 200.

(8) If four joint-tenants jointly demise from year to year, such of them as give notice to quit may recover their several shares in ejectment on their several demises. (3 Taunt. 120). —[CHITTY.]

(9) A lease by a joint-tenant is operative to the extent of his share, being a severance pro tanto, and binding on his co-tenant surviving, (Cro. Jac. 52, 91, 417); but it seems that the rent reserved upon such lease ceases with the life of the grantor. (Dy. 187; Co. Litt. 185. a.). A lease by a joint-tenant for years is a complete severance of the joint-tenancy. (Co. Litt. 192. a.). Formerly, charges by a joint-tenant, which did not operate to sever the tenancy, were not binding on his co-tenant surviving, (Co. Litt. 184. a.); but now a judgment or decree against a joint-tenant, although it is no severance, binds the estate to the extent of his share. (Stat. 1 & 2 Vict. c. 110, s. 11).

other, for receiving more than their due share of the profits of the tenements held in joint-tenancy [10].

Survivorship.

From the same principle also arises the remaining grand incident of joint estates; *viz.* the doctrine of *survivorship:* by which, when two or more persons are seised of a joint estate of inheritance, for their own lives, or *pur autre vie,* or are jointly possessed of any chattel-interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance, or a common freehold only, or even a less estate [w]. This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But while it continues, each of two joint-tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not devested by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all, and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant [11].

[184]

[w] Litt. § 280, 281.

(10) This action is now obsolete; the practice is to apply to a court of equity to compel an account; which jurisdiction is also resorted to in order to obtain a partition. (Com. Dig., *Chanc.*, (3 V. 6), & (4 E.); Mitford's Pleading, 109).

(11) And that free from any claim of dower or of curtesy on account of the inheritance that was in the deceased joint-tenant. (Ante, p. 131, n. (41)).

This right of survivorship is called by our antient authors[x] the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors: or, as they themselves express it, "*pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimam superstitem.*" And this *jus accrescendi* ought to be mutual; which I apprehend to be one reason why neither the king[y], nor any corporation[z], can be a joint-tenant with a private person. For here is no mutuality: the private person has not even the remotest chance of being seised of the entirety, by benefit of survivorship; for the king and the corporation can never die[12].

[185]

3. We are, lastly, to inquire how an estate in joint-tenancy may be *severed* and *destroyed*. And this may be done by destroying any of its constituent unities. 1. That of *time*, which respects only the original commencement of the joint-estate, cannot indeed (being now past) be affected by any subsequent transactions. But, 2. The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*. For joint-tenants being seised *per my et per tout*, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants: for they have now no joint-interest in the whole, but only a several interest respectively in the several parts. And for that reason also, the right of survivor-

3. Joint-tenancy, how severed or destroyed.

Partition.

[x] Bracton, l. 4, tr. 3, c. 9, § 3. Fleta, l. 3, c. 4.

[y] Co. Litt. 190. Finch, L. 83.

[z] 2 Lev. 12.

(12) But Lord Coke says expressly, "there may be joint-tenants, though there be not equal benefit of survivorship; as if a man let lands to A. and B. during the life of A.; if B. die, A. shall have all by survivorship; but if A. die, B. shall have nothing." (Co. Litt. 181). The mutuality of survivorship does not therefore appear to be the reason why a corporation cannot be a joint-tenant with a private person; for two corporations cannot be joint-tenants together; but whenever a joint estate is granted to them, they take as tenants in common. (Co. Litt. 190). But there is no survivorship of a capital, or a stock in trade, among merchants and traders; for this would be ruinous to the family of the deceased partner; and it is a legal maxim, *jus accrescendi inter mercatores pro beneficio commercii locum non habet.* (Co. Litt. 182. See p. 399, post).—[CHRISTIAN.]

ship is by such separation destroyed [a] [13]. By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do [b]: for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now, by the statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, joint-tenants, either of inheritances or other less estates, are compellable by writ of partition to divide their lands [c] [14]. 3. The jointure may be destroyed by destroying the unity of *title*. As if one joint-tenant alienes and conveys his estate to a third person: here the joint-tenancy is severed, and turned into tenancy in common [d]; for the grantee and the remaining joint-tenant hold by different titles, (one derived from the original, the other from the subsequent, grantor), though, till partition made, the unity of possession continues. But [186] a devise of one's share by will is no severance of the join-

Alienation.

[a] Co. Litt. 188, 193.

[b] Litt. § 290.

[c] Thus, by the civil law, *nemo invitus compellitur ad communionem.* (Ff. 12. 6. 26, § 4). And again; *si non omnes qui rem communem habent, sed certi ex his, dividere desiderant; hoc judicium inter eos accipi potest.* (Ff. 10. 3. 8).

[d] Litt. § 292.

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(13) But this partition of a joint estate of freehold cannot be effected without a deed. (Litt. s. 290; Co. Litt. 169. a., 187. a.).

(14) The proceedings upon a writ of partition were further regulated, with a view to render them less dilatory and more effectual, by the 8 & 9 W. 3, c. 31, made perpetual by 3 & 4 Ann. c. 18; but the entire proceeding by writ of partition, which had fallen into desuetude, was abolished by the stat. 3 & 4 Will. 4, c. 27, s. 36; and the only compulsory mode of effecting a partition is now by bill in Chancery, in which proceeding, however, the provisions of the stat. 8 & 9 W. 3, c. 31, are not disregarded. (2 Y. & C. 586). Upon a bill for partition, the court first ascertains the rights and interests of the parties, and then directs a commission to issue to make the partition required, and upon return of that commission, and confirmation of that return by the court, the partition is finally completed by mutual *conveyances* of the allotments made to the several parties. But if the infancy of any of the parties, or other circumstances, prevent such mutual conveyances, the decree can only extend to give possession and enjoyment until conveyances can be made. An infant must have a day to shew cause against a decree after attaining twenty-one, and if cause be not shewn, or being shewn is not allowed, the decree may then be extended to compel mutual conveyances. (Mitford's Pleading, 97, 3rd ed.; Bac. Ab., *Joint-tenants*, (I.) 7; Harg. Co. Litt. 169. a.; 2 P. Wms. 519; 1 Mad. 214; 1 Myl. & K. 331. See 3 Myl. & Cr. 157; 8 Sim. 620).

ture: for no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore a priority to the other [e]) is already vested [f 15]. 4. It may also be destroyed by destroying the unity of *interest*. And therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure [g]; though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate [h]. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure [i]: for it destroys the unity both of title and of interest [16]. And whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it [k]. Yet, if one of three

Merger.

[e] *Jus accrescendi praefertur ultimae voluntati.* Co. Litt. 185.
[f] Litt. § 287.
[g] Cro. Eliz. 470.
[h] 2 Rep. 60. Co. Litt. 182.
[i] Litt. § 302, 303.
[k] *Nihil de re accrescit ei, qui nihil in re, quando jus accresceret, habet.* Co. Litt. 188.

(15) A joint-tenant who wishes to devise his estate must *first* sever it. And if a joint-tenant of real property devises his interest in premises, and after execution of the will there is a partition of the estate, the testator's share did not formerly pass by the devise, unless there was a republication of the will subsequent to the partition. (3 Burr. 1488; Amb. 617). But now, under the stat. 11 Will. 4 & 1 Vict. c. 26, although a joint-tenant cannot defeat his co-tenant's right of survivorship, his devise, made during the joint-tenancy, will operate upon a share coming to him subsequently by partition, or upon the entirety coming by survivorship.

(16) The jointure in the case put is only severed for the time. If A. and B. are joint-tenants in fee, and A. lease for life to C., and die, living B. and C., the reversion in a moiety will descend to A.'s heir, and not survive to B.; and, on the other hand, if B. die living A. and C., the freehold and inheritance in a moiety will descend to B.'s heir. In either case, the jointure is for ever severed. But if C. die, living A. and B., then the jointure revives as at first. The reason of these distinctions is, that a present estate of freehold and a reversion cannot be held in joint-tenancy; and the present freehold of inheritance which B. has cannot be separated into an estate for the life of C. and a reversion, in order that the latter may unite with the reversion in A.; although this might have been done by an original limitation. (Co. Litt. 191. b.; 2 Cox, 155).

joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship[1]: and, if one of three joint-tenants releases his share to one of his companions [17], though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure[m]; for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indispensable properties, a sameness of interest, and undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

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Severance when advantageous.

In general, it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes however it is disadvantageous to dissolve the joint-estate: as if there be joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety[n]. And therefore, if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture[o]: for, in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant by a tenant for his own life merely, is a forfeiture of his estate[p]: for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

Forfeiture.

III. Estate in coparcenary.

III. An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons.

[1] Litt. § 294.
[m] Ibid. § 304. [See 3 Ad. & El. 75.]
[n] 1 Jones, 55.
[o] 4 Leon. 236.
[p] Co. Litt. 252.

(17) 5 Nev. & M. 372; 3 Ad. & El. 75.

It *arises* either by common law or particular custom. By common law: as where a person seised in fee-simple, or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, as will be more fully shewn, when we treat of descents hereafter; and these co-heirs are then called *coparceners;* or, for brevity, *parceners* only [q]. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. [r]. And, in either of these cases [18], all the parceners put together make but one heir; and have but one estate among them [s] [19].

Parceners by custom.

The *properties* of parceners are in some respects like those of joint-tenants; they having the same unities of *interest, title,* and *possession.* They may sue and be sued jointly for matters relating to their own lands [t]; and the entry of one of them shall in some cases enure as the entry of them all [u]. They cannot have an action of trespass against each other: but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste [w]: for coparceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry the Eighth joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points: 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but

[188]

Properties of.

[q] Litt. § 241, 242.
[r] Ibid. § 265.
[s] Co. Litt. 163.
[t] Ibid. 164.
[u] Ibid. 188, 243.
[w] 2 Inst. 403.

(18) A very subtle distinction, however, is taken between coparcenary at common law, and a customary partible descent. "Well said Littleton, 'by the custom,' for sons are parceners in respect of the custom of the fee or inheritance, and not in respect of their persons, as daughters and sisters, &c. be. 'Et sunt participes quasi partem capientes &c. ratione ipsius rei quæ partibilis est, et non ratione personarum quæ non sunt quasi unus hæres et unum corpus, sed diversi hæredes, ubi tenementum partibile est inter plures cohæredes petentes qui descendant de eodem stipite et semper solent dividi ab antiquo.' Bract. lib. 5, fol. 428." (Co. Litt. 176. a.).

(19) Semble, therefore, that coparceners are entitled to be admitted to copyhold tenements as one heir, and upon payment of one set of fees. (3 B. & C. 173).—[CHITTY.]

joint-tenants[x]: and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint tenancy. 2. There is no unity of *time* necessary to an estate in coparcenary. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other; the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners[y]; the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have an *unity*, have not an *entirety* of interest[20]. They are properly entitled each to the whole of a distinct moiety[z]; and of course there is no *jus accrescendi*, or survivorship, between them: for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common*[a].

Unity of time not essential to coparcenary.

[189]

Partition.

Parceners are so called, saith Littleton[b], because they may be constrained to make *partition*[21]. And he mentions many methods of making it[c]; four of which are by consent,

[x] Litt. § 254.
[y] Co. Litt. 164, 174.
[z] Ibid. 163, 164.
[a] Litt. § 309.
[b] § 241.
[c] § 243 to 264.

(20) 5 B. & Ad. 575; 2 Nev. & M. 508.

(21) *Coparceners* may convey to each other, both by feoffment and by release, because their seisin to some intents is joint, and to some several. (Co. Litt. 163. b., 200. b.). Whereas *joint-tenants* can release to, but not enfeoff each other, because the freehold is joint. (Ibid.). And one *tenant in common* may enfeoff his companion, but cannot release to him, because the freehold is several. (Ibid.).—[CHITTY.]

Such partitions are now usually made either by mutual consent and conveyances, or by means of a bill in Chancery, the partition under which must be perfected by conveyance, in the same manner as partitions between joint-tenants. Parceners of a copyhold could not make partition without the sanction of the lord. (P. 41 Eliz. B. R. Fuller, Hal. MSS.; 11 Sim. 315. But see 2 Watk. Copyh. 194; and, now, stat. 4 & 5 Vict. c. 35, s. 85).

and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part [22]. The second is, when they agree to chuse some friend to make partition for them, and then the sisters shall chuse each of them her part according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not chuse first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone, before the younger [d] [23]. And the reason given is, that the former privilege of priority in choice upon a division, arises from an act of her own, the agreement to make partition; and therefore is merely personal: the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also. A third method of partition is, where the eldest divides, and then she shall chuse last; for the rule of law is, *cujus est divisio, alterius est electio.* The fourth method is where the sisters agree to cast lots for their shares. And these are the methods by consent. That by compulsion is, where one or more sue out a writ of partition against the others; whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impanneled, and assign to each of the parceners her part in severalty [e] [24]. But there are some things which [190] are in their nature impartible. The mansion-house, com-

[d] Co. Litt. 166. 3 Rep. 22.

[e] By statute 8 & 9 W. III. c. 31, an easier method of carrying on the proceedings on a writ of partition, of lands held either in joint-tenancy, parcenary, or common, than was used at the common-law, is chalked out and provided [24].

(22) Before the Statute of Frauds, coparceners might have partitioned their inheritance by parol, even where it was held in reversion. (Litt. s. 250; Co. Litt. 169. a.) And a rent-charge might have been granted to one parcener, out of the allotment of the other, by mere parol. (Litt. s. 252). But that statute has made a writing necessary.

(23) It has been doubted whether the grantee of the eldest sister shall have the first and sole presentation after death. (Harg. Co. Litt. 266). But it was expressly determined in favour of such a grantee in 1 Ves. sen. 340).—[CHRISTIAN.] (See Burn's Ecclesiastical Law, 1 vol. 15; 7 Sim. 257).

(24) The proceeding at common law by writ of partition has been abolished. (Ante, p. 185, n. (14)).

mon of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them and make the others a reasonable satisfaction in other parts of the inheritance: or, if that cannot be, then they shall have the profits of the thing by turns, in the same manner as they take the advowson[f].

Hotch-pot.

There is yet another consideration attending the estate in coparcenary: that if one of the daughters has had an estate given with her in *frankmarriage* by her ancestor, (which we may remember was a species of estates-tail, freely given by a relation for advancement of his kinswoman in marriage[g]), in this case, if lands descend from the *same* ancestor to her and her sisters in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frankmarriage in equal proportion with the rest of the lands descending[h]. This mode of division was known in the law of the Lombards[i]; which direct the woman so preferred in marriage, and claiming her share of the inheritance, *mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum.* With us it is denominated bringing those lands into *hotch-pot*[k]: which term I shall explain in the very words of Littleton[l]: "it seemeth that this word *hotch-pot,* is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together." By this housewifely metaphor our ancestors meant to inform us[m], that the lands, both those given in frankmarriage and those descending in fee-simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage: and if she did not chuse to put her lands into hotch-pot, she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her other sisters. The law of hotch-pot took place then only, when the other lands descending from the ancestor were fee-simple; for if they descended in tail, the donee in frank-

[191]

[f] Co. Litt. 164, 165.
[g] See page 115.
[h] Bracton, l. 2, c. 34. Litt. § 266 to 273.
[i] L. 2, t. 14, c. 15.
[k] Britton, c. 72.
[l] § 267.
[m] Litt. § 268.

marriage was entitled to her share, without bringing her lands so given into hotch-pot [n]. And the reason is, because lands descending in fee-simple are distributed by the policy of law, for the maintenance of all the daughters; and if one has a sufficient provision out of the same inheritance, equal to the rest, it is not reasonable that she should have more: but lands descending in tail are not distributed by the operation of the law, but by the designation of the giver, *per formam doni:* it matters not therefore how unequal this distribution may be. Also no lands, but such as are given in frankmarriage, shall be brought into hotch-pot; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage portion [o]. And therefore, as gifts in frankmarriage are fallen into disuse, I should hardly have mentioned the law of hotch-pot, had not this method of division been revived and copied by the statute for distribution of personal estates, which we shall hereafter consider at large.

The estate in coparcenary may be *dissolved,* either by partition, which disunites the possession [25]; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty. How dissolved.

IV. Tenants in *common* are such as hold by several and distinct titles, but by unity of posssession; because none knoweth his own severalty, and therefore they all occupy promiscuously [p]. This tenancy therefore happens where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be IV. Tenancy in common.

[n] Litt. § 274. [o] Ibid. 275. [p] Ibid. 292.

(25) A partition effected by a common-law conveyance to a stranger, to the use of the parceners in equal shares in severalty, does not alter the course of descent; but if the parceners had taken by descent from their mother, each share would, after such partition, descend to the heirs ex parte maternâ. (5 T. R. 107, n.; 5 Ad. & El. 839; Com. Dig., *Parceners,* (C. 15). It would have been otherwise if the conveyance had been to a stranger, to his own use, and he had subsequently reconveyed the several shares to the respective parties. And this is now always the proper course to pursue on a partition between coparceners, for a reason mentioned infra, p. 240, n.

two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no
[192] necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would be soon destroyed.

How created. Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed [26]. By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest: As, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they now have several titles, the other joint-tenant by the original grant, the alienee by the new alienation [q]; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common, as holding by different titles and conveyances [r]. If one of two parceners alienes, the alienee and the remaining parcener are tenants in common [s]; because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances [27]; because, they cannot possibly have one heir of their two

[q] Litt. § 293. [r] Ibid. 295. [s] Ibid. 309.

(26) A third way is by conveyance of an undivided share; as, if A., tenant of four acres in Dale, convey one acre of his estate in Dale to B., A. and B. thereupon become tenants in common of the estate, in the proportion of three to one. One of the examples given in the text, under the head of express limitation, belongs to this division.

(27) And the same is true of a limitation to two men, or two women, and their heirs generally. (4 Mee. & W. 229).

bodies, as might have been the case had the limitation been to *a man and woman,* and the heirs of their bodies begotten [t]: and in this, and the like cases, their issues shall be tenants in common; because they must claim by different titles, one as heir of A., and the other as heir of B.; and those two not titles by purchase, but descent. In short, [193] whenever an estate in joint-tenancy or corparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation in a deed: but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favour joint-tenancy rather than tenancy in common [u]; because the divisible services issuing from land (as rent, *&c.*) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common [w]; and, if one grants to another *half* his land, the grantor and grantee are also tenants in common [x]: because, as has been before [y] observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed that it is impossible they should take a joint-interest in the whole of the tenements. But a *devise* to two persons to hold *jointly and severally,* is said to be a joint-tenancy [z]; because that is necessarily implied in the word "jointly," the word "severally" perhaps only implying the power of partition: and an estate given to A. and B., *equally to be divided* between them, though in *deeds* it hath been said to be a joint-tenancy [a], (for it implies no more than the law has annexed to that estate, *viz.* divisibility [b]), yet in *wills* it is certainly a tenancy in common [c]; because the devisor may be presumed to have meant what is most

The law favours a joint-tenancy.

[t] Litt. 283.
[u] Salk. 392.
[w] Litt. § 298.
[x] Ibid. 299.
[y] See pag. 182.
[z] Poph. 52.
[a] 1 Eq. Cas. Abr. 291.
[b] 1 P. Wms. 17.
[c] 3 Rep. 39; 1 Vern. 32. [See 1 Ventr. 216, 227.]

beneficial to both the devisees, though his meaning is imperfectly expressed [28]. And this nicety in the wording of grants makes it the most usual as well as the safest way,
[194] when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A. and B., to hold *as tenants in common and not as joint tenants.*

Incidents.

As to the *incidents* attending a tenancy in common: tenants in common (like joint-tenants) are compellable by the statutes of Henry VIII. and William III., before mentioned [d], to make partition of their lands; which they were not at common law [29]. They properly take by distinct moieties, and have no entirety of interest: and therefore there is no survivorship between tenants in common [30]. Their other

[d] Pages 185 & 189.

(28) Limitations in deeds operating under the Statute of Uses are construed with the same liberality as wills, (2 Ves. sen. 252); and it is very doubtful whether, even in common-law conveyances, the words *equally to be divided* would not now be held to create a tenancy in common. (See 1 Wils. 341; Harg. Co. Litt. 190. b.). Mr. Christian says, "In ancient times joint-tenancy was favoured by the courts of law, because it was more convenient to the lord and more consistent with feudal principles; but those reasons have long ceased, and a joint-tenancy is now every where regarded, as Lord Cowper says it is in equity, as an odious thing. (1 Salk. 158). In wills the expressions *equally to be divided, share and share alike, respectively, between,* and *amongst*, have been held to create a tenancy in common. (2 Atk. 121; 4 Bro. 15; 1 Cox's P. Wms. 14). I should have little doubt but the same construction would now be put upon the word *severally*, which seems peculiarly to denote separation or division. But those words are only evidence of intention, and will not create a tenancy in common, where the contrary from other parts of the will appears to be the manifest intention of the testator. (3 Bro. 215).

"The words *equally to be divided* make a tenancy in common in surrenders of copyholds, and also in deeds which derive their operation from the Statute of Uses. (1 P. Wms. 14; 1 Wils. 341; 2 Ves. 257). And though Lord Hardwicke seems to be of opinion, (in 1 Ves. 165; 2 Ves. 257), that these words are not sufficient to create a tenancy in common-law conveyances, yet I am inclined to think, that, in such a case, nothing but invincible authority would now induce the courts to adopt that opinion, and to decide in favour of a joint-tenancy."

(29) And now again are not, as has been already noticed, ante, p. 185, n. (14). The only means of compulsion is by bill in equity.

(30) But a tenancy in common with benefit of survivorship may exist without being a joint-tenancy, because survivorship is not the only characteristic of a joint-tenancy. (Per Bayley, J., 1 M. & Sel. 435). That is to say, there may be a devise to several as tenants in common, with a devise over of the share of each one dying to the survivors.

incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to joint-tenants merely upon that account: such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2, c. 22, and 4 Ann. c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate [e]; though, if one actually turns the other out of possession, an action of ejectment will lie against him [f] [31]. But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest, (such as joining or being joined in actions [g], unless in the case where some entire or indivisible thing is to be recovered [h]), these are not applicable to tenants in common whose interests are distinct, and whose titles are not joint but several [32].

How dissolved.

Estates in common can only be *dissolved* two ways: 1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one

[e] Co. Litt. 199.
[f] Ibid. 200.
[g] Litt. § 311.
[h] Co. Litt. 197.

(31) But adverse possession, or the uninterrupted receipt of the rents and profits, no demand being made by the co-tenant, or, if made, refused, and his *title denied*, is now held to be evidence of an actual ouster. And where one tenant in common has been in *undisturbed* possession for twenty years, in an ejectment brought against him by the co-tenant, the jury will be directed to *presume* an actual ouster, and consequently to find a verdict for the defendant, the plaintiff's right to recover in ejectment after twenty years being taken away by the Statute of Limitations. (Cowp. 217). [See stat. 3 & 4 Will. 4, c. 27, s. 12.] If a lessee of two tenants in common pay the whole of the rent to one after notice from the other to pay them each a moiety, the tenant in common, who gave such notice, may distrain for his share. (*Harrison* v. *Barnby*, 5 T. R. 246; 5 Barn. & Ald. 851).—[CHRISTIAN.]

(32) The rule which determines whether tenants in common should sue jointly or severally, is founded upon the nature of their interest in the matter or thing which is the cause of action. For injuries to their common property, as trespass quare clausum fregit, or a nuisance, &c., or the recovery of any thing in which they have a common right, as for rent reserved by them, or waste upon a lease for years, they should all be parties to the action; but they must sue severally in a real action generally, for they have several titles. (Com. Dig., *Abatement*, (E.10); Co. Litt. 197). But if waste be committed where there is no lease by them all, the action by one alone is good. (2 Mod. 62). But one tenant in common cannot avow alone for taking cattle damage-feasant, but he ought also to make cognizance as bailiff of his companion. (2 H. Bl. 386; Sir W. Jones, Rep. 253).—[CHITTY.]

severalty [33]. 2. By making partition between the several tenants in common, which gives them all respective severalties [34]. For indeed tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession. And this finishes our inquiries with respect to the nature of *estates*.

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(33) This is rather a union than a dissolution.

(34) This partition can only be effected by mutual conveyances. (Co. Litt. 169. a.). It may be compelled by bill in Chancery. (Vide ante, p. 185). But it seems that the Court of Chancery could not compel a partition of copyholds until that power was conferred by the recent statute 4 & 5 Vict. c. 35, s. 85. (11 Sim. 315).

CHAPTER XIII.

OF THE TITLE TO THINGS REAL, IN GENERAL.

THE foregoing chapters having been principally employed in defining the *nature* of things real, in describing the *tenures* by which they may be holden, and in distinguishing the several kinds of *estate* or interest that may be had therein; I come now to consider, lastly, the *title* to things real, with the manner of acquiring and losing it. Title to things real.

A title is thus defined by Sir Edward Coke[a], *titulus est justa causa possidendi id quod nostrum est;* or, it is the means whereby the owner of lands hath the just possession of his property. Title defined.

There are several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

I. The lowest and most imperfect degree of title consists in the mere *naked possession,* or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This may happen, when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a *disseisin,* being a deprivation of that actual seisin, or corporal freehold of the lands, which the tenant before enjoyed[1]. Or it may happen, that after the death of the ancestor and before the entry of the heir, or after the death of a particular tenant and before [196] the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner I. Mere possession. Disseisin.

[a] 1 Inst. 345.

(1) For more upon disseisin, see Vol. 3, p. 167 et seq.

may put an end to, by a variety of legal remedies, as will more fully appear in the third book of these commentaries. But in the mean time, till some act be done by the rightful owner to devest this possession and assert his title, such actual possession is, *primâ facie*, evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. And at all events, without such actual possession, no title can be completely good.

II. Right of possession.

II. The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the actual possession is not in himself but in another. For if a man be disseised, or otherwise kept out of possession, by any of the means before mentioned, though the *actual* possession be lost, yet he has still remaining in him the *right* of possession; and may exert it whenever he thinks proper, by entering upon the disseisor, and turning him out of that occupancy which he has so illegally gained. But this right of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better; and an *actual* right of possession, which will stand the test against all opponents. Thus, if the disseisor, or other wrongdoer, dies possessed of the land whereof he so became seised by his own unlawful act, and the same descends to his heir; now by the common law the heir hath obtained an *apparent* right, though the *actual* right of possession resides in the person disseised; and it shall not be lawful for the person disseised to devest this apparent right by mere entry or other act of his own, but only by an action at law[b 2]: for, until the contrary be proved by legal demonstration, the
[197] law will rather presume the right to reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. Which doctrine in some measure arose from the principles of the feodal law,

[b] Litt. § 385.

(2) That is to say, a *real* action. Real actions (with some few exceptions) having been abolished by the stat. 3 & 4 Will. 4, c. 74, this effect of a descent from a disseisor, called a descent cast, was also taken away by the same statute, sect. 39. (Vide infra, Vol. 3, p. 174).

which, after feuds became hereditary, much favoured the right of descent; in order that there might be a person always upon the spot to perform the feodal duties and services[c]: and therefore when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feodal court. But if he, who has the actual right of possession, puts in his claim, and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession, to which he hath such actual right. Yet, if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence[3]. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of; *viz.*

III. Mere right of property.

III. The mere *right of property*, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right*, *jus merum;* and the estate of the owner is in such cases said to be totally divested, and *put to a right*[d]. A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favour of his antagonist; who has thereby obtained the absolute right of possession. As, in the first place, if a person disseised, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law: by this means the disseisor or his heirs gain the actual right of possession; for the law presumes that [198] either he had a good right originally, in virtue of which he entered on the lands in question, or that since such his

[c] Gilb. Ten. 18. [d] Co. Litt. 345.

(3) As to this *limitation* of the time for recovering real property, vide infra, p. 266, n.

entry he has procured a sufficient title; and, therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without inquiring into the absolute right of property. Yet, still, if the person disseised or his heir hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right: but, by proving such his better right, he may at length recover the lands. Again, if a tenant in tail discontinues his estate-tail, by alienating the lands to a stranger in fee, and dies; here the issue in tail hath no right of *possession*, independant of the right of *property:* for the law presumes *primâ facie* that the ancestor would not disinherit, or attempt to disinherit, his heir, unless he had power so to do: and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed, unless by shewing the absolute right of property to reside in another person. The heir therefore in this case has only a *mere right*, and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any *possessory* action, (that is, such wherein the right of possession only, and not that of property, is contested), and the other party hath indeed in himself the right of property, this is now turned to a *mere right;* and upon proof thereof in a subsequent action, denominated a writ of right, he shall recover his seisin of the lands [4].

Thus, if a disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession*, and *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent* right of *possession;* but I still retain the *actual* right both of *possession* and *property*. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the *actual right of*
[199] *possession*, and I retain nothing but the *mere right of property*. And even this right of property will fail, or at least

(4) This right of property, as distinguished from the right of possession, has been abolished in almost every case by the abolition of those real actions, in which alone it could have been vindicated. (Vide infra, Vol. 3, p. 179).

it will be without a remedy, unless I pursue it within the space of sixty years. So also if the father be tenant in tail, and alienes the estate-tail to a stranger in fee, the alienee thereby gains the *right of possession*, and the son hath only the *mere right* or *right of property*. And hence it will follow, that one man may have the *possession*, another the *right of possession*, and a third the *right of property*. For if tenant in tail infeoffs A. in fee-simple, and dies, and B. disseises A.; now B. will have the *possession*, A. the *right of possession*, and the issue in tail the *right of property*. A. may recover the possession against B.; and afterwards the issue in tail may evict A., and unite in himself the possession, the right of possession, and also the right of property. In which union consists,

IV. A complete title to lands, tenements, and hereditaments. For it is an antient maxim of the law [c], that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit* [f]. And when to this double right the actual possession [5] is also united; when there is, according to the expression of Fleta [g], *juris et seisinæ conjunctio*, then, and then only, is the title completely legal.

IV. Complete title by junction of possession, right of possession, and right of property.

[c] Mirr. 1. 2, c. 27. [f] Co. Litt. 266. Bract. l. 5, tr. 3, c. 5, § 2.
[g] L. 3, c. 15, § 6.

(5) That is to say, legal possession of the freehold by the occupation of the owner, of his bailiff, or of his tenant at sufferance, at will, or for years.

CHAPTER XIV.

OF TITLE BY DESCENT.

The modes of losing, continuing, and acquiring a title to real property.

THE several gradations and stages, requisite to form a complete title to lands, tenements, and hereditaments, having been briefly stated in the preceding chapter, we are next to consider the several manners in which this complete title (and therein principally the right of *property*) may be reciprocally lost and acquired: whereby the dominion of things real is either continued, or transferred from one man to another. And here we must first of all observe, that (as gain and loss are terms of relation, and of a reciprocal nature) by whatever method one man gains an estate, by that same method or its correlative some other man has

Descent.

lost it. As where the heir acquires by descent, the ancestor has first lost or abandoned his estate by his death: where the

Escheat.

lord gains land by escheat, the estate of the tenant is first of all lost by the natural or legal extinction of all his hereditary

Occupancy.

blood: where a man gains an interest by occupancy, the former owner has previously relinquished his right of possession:

Prescription.

where one man claims by prescription or immemorial usage, another man has either parted with his right by an antient and now forgotten grant, or has forfeited it by the supineness or neglect of himself and his ancestors for ages; and

Forfeiture.

so, in case of forfeiture, the tenant by his own misbehaviour or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may

Alienation.

take advantage of such default: and, in alienation by common assurances, the two considerations of loss and

[201]

acquisition are so interwoven, and so constantly contemplated together, that we never hear of a conveyance, without at once receiving the ideas as well of the grantor as the grantee.

These are reducible to descent by purchase.

The methods therefore of acquiring on the one hand, and

of losing on the other, a title to estates in things real, are reduced by our law to two: *descent*, where the title is vested in a man by the single operation of law; and *purchase*, where the title is vested in him by his own act or agreement [a] [1].

Definition and nature of descents.

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate, so descending to the heir, is in law called the inheritance.

Importance of doctrine of descents.

The doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principal universally known, and upon which their subsequent limitations are to work. Thus, a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive that this is an estate confined in its descent to such heirs only of the donee as have sprung or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heir; this is a point that we must result back to the standing law of descents in fee-simple to be informed of.

[a] Co. Litt. 18.

(1) See, however, Mr. Hargrave's note, (Co. Litt. 18. b.), where he distinguishes, (perhaps too astutely), a title by *escheat* both from a purchase and from a descent. Upon similar reasoning, a further division might be made in favour of title by prerogative, as where the crown takes land conveyed to an alien, &c.; but *purchase* is generally understood to be any acquisition otherwise than by descent.

"Purchase in law is used in contradistinction to descent, and is any other mode of acquiring real property, viz. by a man's own act and agreement, by devise, and by every species of gift or grant; and as the land taken by purchase has very different inheritable qualities from land taken by descent, the distinction is important. (See post, pp. 241, 243)."—[CHRISTIAN.]

Descent at common law

In order therefore to treat a matter of this universal consequence the more clearly, I shall endeavour to lay aside such matters as will only tend to breed embarrassment and confusion in our inquiries, and shall confine myself entirely to this one object. I shall therefore decline considering at present who are, and who are not, capable of being heirs; reserving that for the chapter of *escheats*. I shall also pass over the frequent division of descents in those by *custom*, *statute*, and *common law*: for descents by *particular custom*, as to all the sons in gavelkind, and to the youngest in borough-english, have already been often [b] hinted at, and may also be incidentally touched upon again; but will not make a separate consideration by themselves, in a system so general as the present: and descents by *statute*, or fees-tail *per formam doni*, in pursuance of the statute of Westminster the second, have also been already [c] copiously handled; and it has been seen that the descent in tail is restrained and regulated according to the words of the original donation, and does not entirely pursue the common law doctrine of inheritance [3]; which, and which only, it will now be our business to explain.

depends on degrees of consanguinity.

And, as this depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state, as briefly as possibile, the true notion of this kindred or alliance in blood [d].

Consanguinity defined.

Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendentium;*" the connexion or relation of persons de-

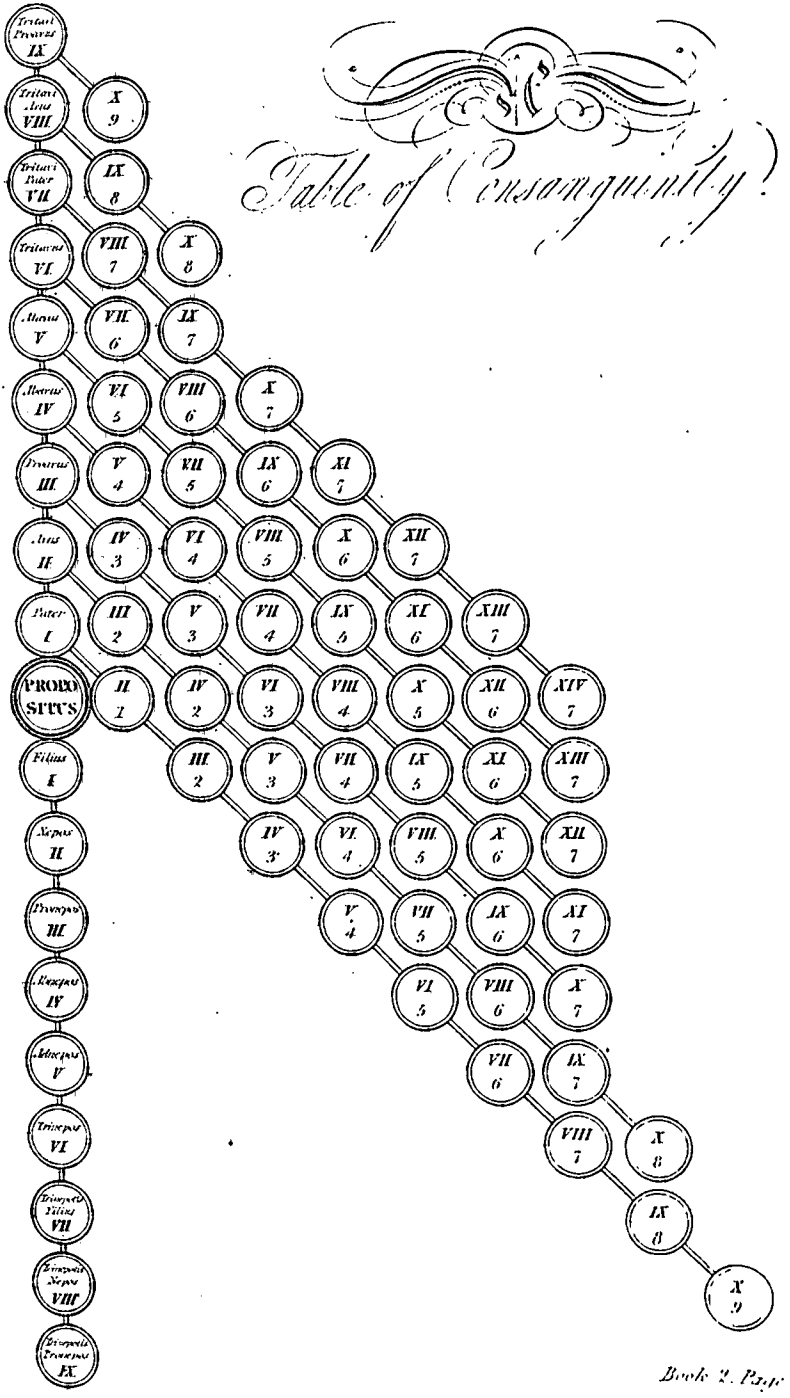
[b] See Vol. I. pages 74, 75. Vol. II. pages 83, 85.

[c] See pages 112, &c.

[d] For a fuller explanation of the doctrine of consanguinity, and the consequences resulting from a right apprehension of its nature, see "*An Essay on collateral Consanguinity.*" (Law Tracts, Oxon. 1762, 8vo. or 1771, 4to.).

(3) The devolution of an estate tail is of a very different nature from a descent in fee-simple at common law; in the former, the heir of the original purchaser or donee in tail succeeds; in the latter, the succession devolved upon the heir of the person last seised; and consequently, the rule excluding the half blood, and the effect of a possessio fratris, had no application to a descent in tail, (8 T. R. 211); and (until the 26 Hen. 8, c. 28) each taker was so far considered to take as a purchaser under the original gift, per formam doni, that his claim was not hindered by the attainder and corruption of the blood of his ancestor. (3 Rep. 10; 8 Rep. 165 a; Cr. El. 28).

Table of Consanguinity.



scended from the same stock or common ancestor. This consanguinity is either lineal, or collateral.

[203]

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil [e], and canon [f], as in the common law [g].

Lineal consanguinity.

The doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees; and so many different bloods [h] is a man said to contain in his veins, as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate [i]. This lineal consanguinity, we may observe, falls strictly within the definition of *vinculum personarum ab eodem stipite descendentium;* since lineal rela-

Number of lineal ancestors.

[204]

[e] Ff. 38. 10. 10.

[f] Decretal. l. 4, tit. 14.

[g] Co. Litt. 23.

[h] Ibid. 12.

[i] This will seem surprising to those who are unacquainted with the increasing power of progressive numbers; but is palpably evident from the following table of a geometrical progression, in which the first term is 2, and the denominator also 2; or, to speak more intelligibly, it is evident,

tions are such as descend one from the other, and both of course from the same common ancestor.

Collateral consanguinity.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the *stirpes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have
[205] each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

We must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus *Titius* and his brother are related: why? because both are derived from one father: *Titius* and his first cousin are related: why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they both are derived from one and the same great-grandfather. In

for that each of us has two ancestors in the first degree; the number of whom is doubled at every remove, because each of our ancestors has also two immediate ancestors of his own.

Lineal Degrees.	*Number of Ancestors.*	*Lineal Degrees.*	*Number of Ancestors.*
1	2	11	2048
2	4	12	4096
3	8	13	8192
4	16	14	16384
5	32	15	32768
6	64	16	65536
7	128	17	131072
8	256	18	262144
9	512	19	524288
10	1024	20	1048576

A shorter method of finding the number of ancestors at any even degree is by squaring the number of ancestors at half that number of degrees. Thus 16 (the number of ancestors at four degrees) is the square of 4, the number of ancestors at two; 256 is the square of 16; 65536 of 256; and the number of ancestors at 40 degrees would be the square of 1048576, or upwards of a million millions.

short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by holy writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other. For indeed, if we only suppose each couple of our ancestors to have left, one with another, two children; and each of those children on an average to have left two more; (and without such a supposition, the human species must be daily diminishing), we shall find that all of us have now subsisting near two hundred and seventy millions of kindred in the fifteenth degree, at the same distance from the several common ancestors as ourselves are; besides those that are one or two descents nearer to or farther from the common stock, who may amount to as many more [k]. And if this calculation should appear incompatible with the number of inhabitants on the earth, it is because, by intermarriages among the several descendants from the same ancestor, a hundred or a thousand modes of consanguinity may be consolidated in one person, or he may be related to us a hundred or a thousand different ways.

[k] This will swell more considerably than the former calculation; for here, though the first term is but 1, the denominator is 4; that is, there is *one* kinsman (a brother) in the first degree, who makes, together with the *propositus*, the two descendants from the first couple of ancestors; and in every other degree the number of kindred must be the *quadruple* of those in the degree which immediately precedes it (4). For, since each couple of ancestors has two descendants, who increase in a duplicate *ratio*, it will follow that the *ratio*, in which all the descendants increase downwards, must be double to that in

(4) The learned Judge's reasoning is just and correct; and that the collateral relations are quadrupled in each generation may be thus demonstrated:—As we are supposed, upon an average, to have one brother or sister, the two children by the father's brother or sister will make two cousins, and the mother's brother or sister will produce two more, in all, four. For the same reason, my father and mother must each have had four cousins, and their children are my second cousins; so I have eight second cousins by my father, and eight by my mother; together sixteen. And thus again, I shall have 32 third cousins on my father's side, and 32 on my mother's, in all, 64. Hence it follows that each preceding number in the series must be multiplied by twice two or four.

This immense increase of the numbers depends upon the supposition that no one marries a relation; but to avoid such a connexion, it will very soon be necessary to leave the kingdom. How these two tables of consanguinity may be reduced by the intermarriage of re-

Computation of degrees by the canon law;

The method of computing these degrees in the canon law[l], which our law has adopted[m], is as follows: We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is
[207] the degree in which they are related to each other. Thus *Titius* and his brother are related in the first degree; for from the father to each of them is counted only one; *Titius* and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor, *viz.* his own grandfather, the father of *Titius*. Or, (to

which the ancestors increase upwards; but we have seen that the ancestors increase upwards in a duplicate *ratio:* therefore the descendants must increase downwards in a double duplicate, that is, in a quadruple *ratio.*

Collateral Degrees.	*Number of Kindred.*	*Collateral Degrees.*	*Number of Kindred.*
1	1	11	1048576
2	4	12	4194304
3	16	13	16777216
4	64	14	67108864
5	256	15	268435456
6	1024	16	1073741824
7	4096	17	4294967296
8	16384	18	17179869184
9	65536	19	68719476736
10	262144	20	274877906944

This calculation may also be formed by a more compendious process, *viz.* by squaring the couples, or half the number of ancestors, at any given degree; which will furnish us with the number of kindred we have in the same degree, at equal distance with ourselves from the common stock, besides those at unequal distances. Thus, in the tenth lineal degree, the number of ancestors is 1024; its half, or the couples, amount to 512; the number of kindred in the tenth collateral degree amounts therefore to 262144, or the square of 512. And if we will be at the trouble to recollect the state of the several families within our own knowledge, and observe how far they agree with this account; that is, whether on an average every man has not one brother or sister, four first cousins, sixteen second cousins, and so on; we shall find that the present calculation is very far from being overcharged.

[l] Decretal. 4, 14. 3 & 9.

[m] Co. Litt. 23.

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lations, will appear from the following simple case:—If two men and two women were put upon an uninhabited island, and became two married couple, if they had only two children each, a male and female, who respectively intermarried, and in like manner produced two children, who are thus continued *ad infinitum;* it is clear, that there would never be more than four persons in each generation; and if the parents lived to see their great-grandchildren, the whole number would never be more than sixteen; and thus the families might be perpetuated without any incestuous connexion.—[CHRISTIAN.]

give a more illustrious instance from our English annals), king Henry the Seventh, who slew Richard the Third in the battle of Bosworth, was related to that prince in the fifth degree. Let the *propositus* therefore in the table of consanguinity represent king Richard the Third, and the class marked (ℓ) king Henry the Seventh. Now their common stock or ancestor was king Edward the Third, the *abavus* in the same table: from him to Edmund duke of York, the *proavus*, is one degree; to Richard earl of Cambridge, the *avus*, two; to Richard duke of York, the *pater*, three; to king Richard the Third, the *propositus*, four; and from king Edward the Third to John of Gant (a) is one degree; to John earl of Somerset (b), two; to John duke of Somerset (c), three; to Margaret countess of Richmond (d), four; to king Henry the Seventh (e), five. Which last-mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though, according to the computation of the civilians, (who count upwards, from either of the persons related, to the common stock, and then downwards again to the other; reckoning a degree for each person both ascending and descending), these two princes were related in the ninth degree: for from king Richard the Third to Richard duke of York is one degree; to Richard earl of Cambridge, two; to Edmund duke of York, three; to king Edward the Third, the common ancestor, four; to John of Gant, five; to John earl of Somerset, six; to John duke of Somerset, seven; to Margaret countess of Richmond, eight; to king Henry the Seventh, nine [n] [5].

by the civil law

[n] See the table of consanguinity annexed; wherein all the degrees of collateral kindred to the *propositus* are computed so far as the tenth of the civilians and the seventh of the canonists inclusive; the former being distinguished by the numeral letters, the latter by the common cyphers.

(5) The difference of the computation by the civil and canon laws may be expressed shortly thus: The civilians take the sum of the degrees in both lines to the common ancestor; the canonists take only the number of degrees in the longest line. Hence, when the canon law prohibits all marriages between persons related to each other within the seventh degree, this would restrain all marriages within the 14th degree of the civil law. In the 1st Vol. 435, n., it is observed that all marriages are prohibited between persons who are related to each other within the third degree, according to the compu-

Canons of descent.

The nature and degrees of kindred being thus in some measure explained [6], I shall next proceed to lay down a series of rules or canons of inheritance, according to which estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and progress, the reasons upon which they are founded, and, in some cases their agreement with the laws of other nations.

1. Lineal descent to issue of person last seised.

I. The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum;* but shall never lineally ascend [7].

Difference between heirs apparent and presumptive.

To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est hæres viventis* [8]. Before that time the person who is next in

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tation of the civil law. This affords a solution to the vulgar paradox, that first cousins may marry and second cousins cannot. For first cousins and all cousins may marry by the civil law; and neither first nor second cousins can marry by the canon law. But all the prohibitions of the canon law might have been dispensed with. It is said, that the canon-law computation has been adopted by the law of England; yet I do not know a single instance in which we have occasion to refer to it. But the civil-law computation is of great importance in ascertaining who are entitled to the administration, and to the distributive shares, of intestate personal property. (See pp. 504, 515).—[CHRISTIAN.] The ecclesiastics, by their canon law prohibiting marriage between relations till after the fourth degree, that they might exclude as many as possible from the liberty of marriage within those degrees, without a dispensation, reckoned all in the direct ascending or descending line, and those in the collateral line corresponding with them, to be but one degree. (Prec. Ch. 593; 2 P. Wms. 735).

(6) The student will do well to discard this explanation of the nature or degrees of kindred entirely from his recollection while reading what follows upon the canons of descent, which are not in the least dependent upon, or illustrated by, the rules either of the civil or of the canon law, as to degrees of consanguinity. This preliminary disquisition, in fact, should have preceded the chapter on the distribution of personal estate, and is entirely out of place here.

(7) This rule is now altered, (vide infra, p. 240). The word descent is, for convenience' sake, applied to an inheritance by an uncle, and in the recent act it is declared to include also inheritance by a parent or other ancestor.

(8) In a devise, however, if lands be left to the heir of M., it may be good as *designatio personæ*, and he may take in the lifetime of M. (2 W. Bl. 1010). There is also an exception to this rule in the case of the duchy of Cornwall, which vests in the queen's first-born son in the lifetime of his mother. (3 Bac. Ab. 449; 8 Rep. 1;

the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heir to the father whenever he happens to die. Heirs presumptive are such who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases, the estate shall be devested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally devested by the birth of a posthumous son [o] [9].

[o] Bro. tit. *Discent*, 58.

Seld. Tit. Hon. 2, 5). But this is not by descent, but by special gift or settlement of the legislature. The title of duke of Cornwall, and the inheritance of the duchy, were first created and vested in Edward the Black Prince (who was the first duke in England after the duke of Normandy), by a grant in the eleventh year of the reign of Edward III. (A.D. 1337). This grant has been held to be an act of the legislature, or a charter confirmed by Parliament; and is consequently good, though it alter the established course of descent, which the king's grant could not do. (8 Rep. 1). It follows that the king's eldest son, being heir apparent, is always by inheritance duke of Cornwall, without a new creation. (Id. ib.). On the death of the eldest son, the second or eldest surviving son takes the inheritance; a peculiar descent, founded on the legislative grant. (1 Ves. sen. 294; Collins' Bar. 148; 1 Bla. Com. 224, n. 10, by Mr. Christian). But it seems, that as the duke of Cornwall must be not only the eldest son, but the heir apparent, the second surviving son would not succeed to the dukedom, if his eldest brother left issue, who would be heir apparent; but it would in that case revert to the crown. (Id. n. 10). It appears that the disabilities of minority do not hold against a duke of Cornwall with respect to the duchy rights and possessions. (Id.; Chitty, jun., Prerog. 404 & 376, and n. (*h*); Bro. Ab. *Prerog.* p. 132). The general rule is, that, till a prince is born, the king is seised of all the possessions, (Com. Dig. *Roy*, 9); but when born, the prince is immediately seised in fee; and leases, &c. made by the king, may be determined by the prince, and he may have a *scire facias* for that purpose. (See Chitty jun.'s Prerog. of the Crown, p. 404; H. Chit. Desc. 15, n.).—[CHITTY.]

(9) But besides the case of a posthumous child, if lands are given to a son, who dies, leaving a sister his heir; if the parents have, at any distance of time afterwards, another son, this son shall devest the descent upon the sis-

Necessity of seisin to make ancestor.

We must also remember, that no person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years [10], or by receiving rent from a lessee of the freehold [p 11]: or unless he hath had what is equivalent to corporal seisin in heredi-

[p] Co. Litt. 15.

ter, and take the estate as heir to his brother. (Co. Litt. 11; Doct. and Stud. 1, Dial. c. 7). So the same estate may be frequently devested by the subsequent birth of a nearer presumptive heir. As if an estate is given to an only child, who dies, it may descend to an aunt, who may be stripped of it by an after-born uncle, on whom a subsequent sister of the deceased may enter, and who will again be deprived of the estate by the birth of a brother. It seems to be determined that every one has a right to retain the rents and profits which accrued whilst he was thus legally possessed of the inheritance. (Harg. Co. Litt. 11; 3 Wils. 526).—[CHRISTIAN.] But where a posthumous child takes by *purchase*, he is entitled to the intermediate profits.

(10) The possession of a lessee for years of a copyhold, at least where the lease was made by license, is of a common-law estate, while that of the copyholder is customary; and hence it has been doubted whether such possession is sufficient to carry the seisin to an heir. (See 3 Leon. 69; 4 Id. 38; Moor, 125; 4 Rep. 22).

(11) It was doubtful whether receiving rent from a freehold lessee was equivalent to actual seisin; but the authorities seem to preponderate against the statement of the text. (See Co. Litt. 15. a. n., 32. a.; 3 Rep. 42 a; Al. 87; *Doe* v. *Keen*, 7 T. R. 390; *Doe* v. *Whichelo*, 8 Id. 213).

In the case of *Doe* v. *Keen*, Lord Kenyon said, "This distinction was taken by Lord Coke, (Co. Litt. 15. a.; and see Jenk. 242), and has since been frequently adopted, that if the father die, his estate being out on a freehold lease, this is not such a possession as to induce the possessio fratris, unless the elder son live to receive rent *after the expiration of such lease;* but it has always been the settled rule, that if the father die leaving his estate out on a lease for years only, the possession of the tenant is so far the possession of the elder son as to constitute the possessio fratris." In the subsequent case of *Doe* v. *Whichelo*, the same learned judge said, that, "in respect of possessio fratris, there is a difference between freehold and chattel leases outstanding. In the former case, unless the elder brother *afterwards* obtain possession by the receipt of rent or other acknowledgment, the descent will be to the younger brother of the half blood in preference to the sister of the whole blood." In both cases, the receipt of rent contemplated is evidently not during the subsistence of the freehold lease, but after its expiration. Upon principle it is difficult to understand how, if any act of ownership over a reversion could be equivalent to actual seisin, so as to exclude the half blood, the actual receipt of rent as reversioner should not be sufficient for that purpose.

But the making of a reversionary lease for life, or a gift in tail, or the granting of the remainder or reversion to a third person to the use of the grantor, was sufficient to vest the quasi actual seisin in the person doing such act. See 3 Bos. & P. 649; 15 East, 294; 2 Preston on Abstracts, p. 442).

taments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson [q], and the like [12]. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seised [13]. And therefore, all the cases which will be mentioned in the present chapter, are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seised thereof. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir [14]. Which notoriety had succeeded in the place of the antient feodal investiture, whereby, while feuds were precarious, the vassal on the descent of lands was formerly admitted in the lords court (as is still the practice in Scotland) and there received his seisin, in the nature of a renewal of his ancestor's grant, in the presence of the feodal peers: till at length, when the right of succession became indefeasible, an entry on any part of the lands within the county (which if disputed was afterwards to be tried by

[q] Co. Litt. 11.

(12) Entry or possession, or receipt of the profits, by a guardian of an infant, or by a stranger, (who was presumed to enter as guardian), was equivalent to entry by the infant himself. (2 Rep. 106 a; Co. Litt. 15. a.; 7 T. R. 386; 4 Scott, N. R. 449). And the entry of one coparcener or tenant in common, was generally the entry of all. (Hob. 120; Co. Litt. 253. b.; 5 B. & Ad. 575). Acts of ownership, equivalent to seisin at law, were required in respect of equitable interests. "The possession of a trust is by bill in equity." (Mosel. 721; 2 Ves. sen. 638; 2 Jac. & W. 201).

(13) This requisition of seisin does not, however, apply where the proposed ancestor was a purchaser; for from him the estate or right to be inherited shall descend whether he was seised or not. (Pollex. 54; 2 Wils. 29; 4 Scott, N. R. 449). Talbot, C., speaking of a contingent estate said, "It does not indeed absolutely vest, because the contingency may never arise; but it is carrying it too far to say that it does not vest at all. Why may it not vest in such a manner as to be transmissible? A condition may descend upon the heir, although no estate does actually descend from the ancestor, and when the condition is performed he shall be in by descent, because of the condition descending." (Cas. temp. Talb. 123). Thus the estate of a devisee or surrenderee of copyhold is transmissible before he is admitted. (5 Burr. 2786). It is said of remainders contingent as to the person, that they are not descendible until that contingency is determined, (Fearne, 371; Watk. Desc. 4); but this is only to say that you cannot trace the descent until you know from whom it is to be traced.

(14) This rule has been altered, (infra, p. 240, n.).

those peers), or other notorious possession, was admitted as equivalent to the formal grant of seisin, and made the tenant capable of transmitting his estate by descent. The seisin therefore of any person, thus understood, makes him the root or stock, from which all future inheritance by right of blood must be derived: which is very briefly expressed in this maxim, *seisina facit stipitem* [r] [15].

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Lineal descent from father to son, &c.

When therefore a person dies so seised, the inheritance first goes to his issue: as if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchases lands, and dies; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey: to whom the land shall never ascend, but shall rather escheat to the lord [s] [16].

Exclusion of lineal ascent.

This rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations; and

[r] Flet. l. 6, c. 2, § 2. [s] Litt. § 3.

(15) If an heir died without having acquired actual seisin, his widow was, notwithstanding, entitled to dower, (ante, p. 131); and if she obtained an assignment of her third, and entered, she established a posthumous seisin in fact, on behalf of her deceased husband, as to that third, and thus defeated pro tanto the descent which had in the meantime taken effect on the heir of her husband's ancestor. (Litt. s. 393; Co. Litt. 15. a., 31. a., 240. b. See Watk. Desc. c. 1, s. 3).

(16) That is, the parent shall not take the estate as heir to the child, in that capacity, but he may inherit as cousin. (2 P. Wms. 613). "Suppose two cousins to intermarry, and that there is issue of that marriage a son, who purchases lands and dies; in inquiring for the heir to the son, it is a decisive objection against a claim by the father that he is the father, as often as the question is whether he shall be preferred to the uncle or great-uncle of the son on the part of his father. But let the paternal line fail, other recourse must be had to the maternal line. In that line the father may succeed as a cousin to his son." (2 Prest. Abstr. 450). So if a son purchase lands and dies without issue, his uncle shall have the land as heir, and not the father, though the father is nearer of blood, (Litt. s. 3); but if in this case the uncle acquires actual seisin and dies without issue, while the father is alive, the latter may then by this circuity, have the land as heir to the uncle, though not as heir to the son, for that he cometh to the land by collateral descent, and not by lineal ascent. (Craig, de Jur. Feud. 234; Wright's Ten. 182, n. (Z)). So under a limitation to "the next of blood of A." the father would, on the death of the son without issue, take, in exclusion both of the brothers and uncle of A., who would have first succeeded under the usual course of descent, as heirs of A.; for a father is nearer in proximity of blood than a brother or an uncle, (Litt. s. 3; Co. Litt. 10. b., 11. a.; 3 Rep. 40 b; 1 Vent. 414; Hale, C. L. 323); and this is the reason why the father is preferred, in the administration of the goods of the son, before any other relation, except his wife and children.—[CHITTY.]

it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue, the father succeeded to the son, in exclusion of brethren, unless one of them married the widow and raised up seed to his brother[t]. And by the laws of Rome, in the first place, the children or lineal descendants were preferred; and on failure of these, the father and mother or lineal ascendants succeeded together with the brethren and sisters[u]; though by the law of the twelve tables the mother was originally, on account of her sex, excluded[v]. Hence this rule of our laws has been censured and declaimed against, as absurd and derogating from the maxims of equity and natural justice[w]. Yet that there is nothing unjust or absurd in it, but that on the contrary it is founded upon very good legal reason, may appear from considering as well the nature of the rule itself, as the occasion of introducing it into our laws.

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Reasons for this latter rule,

We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor: after which the land by the law of nature would again become common and liable to be seized by the next occupant; but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession is continued and transmitted from one man to another, according to the rules which each state has respectively thought proper to

[t] Seld. De Success. Ebraeor. c. 12.
[u] Ff. 38. 15. 1. Nov. 118, 127.
[v] Inst. 3. 3. 1.
[w] Craig. De Jur. Feud. l. 2, t. 13, § 15. Locke on Gov. part 1, § 90.

prescribe. There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal law [17].

which is a consequence of the feudal law.

If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feodal tenures. For it was an express rule of the feodal law [x], that *successionis feudi talis est natura, quod ascendentes non succedunt;* and therefore the same maxim obtains also in the French law to this day [y] [18]. Our Henry the First indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line [z]: but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry the Second, we find it laid down as established law [a], that *hæreditas nunquam ascendit;* which has remained an invariable maxim ever since. These circumstances evidently shew this rule to be of feodal original; and taken in that light, there are some arguments in its favour, besides those which
[212] are drawn merely from the reason of the thing. For if the feud of which the son died seised, was really *feudum antiquum,* or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum,* or one descended from his mother; and then, for other reasons (which will appear hereafter), the father could in no wise inherit it. And if it

[x] 2 Feud. 50. [y] Domat. p. 2, l. 2, t. 2. Montesq. Esp. L. 1. 31, c. 33.
[z] LL. Hen. I. c. 70. [a] L. 7, c. 1.

(17) This observation will scarcely serve to vindicate the rule in question from the charge of absurdity and injustice, in the sense in which that charge is made. The rules of descent have obviously been framed with a regard to the natural claims of relationship, and whenever they deviate from that principle, without an adequate reason, they may justly be described as inconsistent both with themselves and with "natural justice." To explain historically how the anomaly happened to arise affords no apology for its present existence.

(18) By the Code Civil, however, upon failure of lineal descendants of the deceased owner, and of his brothers and sisters and their descendants, the inheritance is equally divided between the two ascending lines, the nearest in degree in each line taking a moiety, and, if more than one, per capita. (L. 3, tit. 1, 746).

were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feodal constitutions[b]; which was founded as well upon the personal merit of the vassal, which might be transmitted to his children, but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feodal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum*, or with all the qualities annexed of a feud descended from his ancestors, such feud must in all respects have descended as if it had been really an antient feud; and therefore could not go to the father, because, if it had been an antient feud, the father must have been dead before it could have come to the son. Thus, whether the feud was strictly *novum* or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases the father could possibly succeed. These reasons, drawn from the history of the rule itself, seem to be more satisfactory than that quaint one of Bracton[c], adopted by Sir Edward Coke[d], which regulates the descent of lands according to the laws of gravitation [19].

II. A second general rule or canon is, that the male issue shall be admitted before the female. II. Males preferred to females.

Thus sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred[e]. As if John [213]

[b] 1 Feud. 20.

[c] *Descendit itaque jus, quasi ponderosum quid, cadens deorsum rectâ lineâ, et nunquam reascendit eâ viâ quâ descendit.* L. 2, c. 29.

[d] 1 Inst. 11.

[e] Hal. H. C. L. 235.

(19) However ingenious and satisfactory these reasons may appear, there is little consistency in the application of them; for if the father does not succeed to the estate, because it must be presumed that it has passed him in the course of descent, the same reason would prevent an elder brother from taking an estate by descent from the younger. And if it does not pass to the father, lest the lord should have been attended by an aged decrepit feudatory, the same principle would be still stronger to exclude the father's eldest brother from the inheritance, who is now permitted to succeed to his nephew.—[CHRISTIAN.]

Stiles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession, in preference to both the daughters.

In what countries this rule prevailed,

This preference of males to females is entirely agreeable to the law of succession among the Jews [f], and also among the states of Greece, or at least among the Athenians [g]; but was totally unknown to the laws of Rome [h], (such of them I mean as are at present extant), wherein brethren and sisters were allowed to succeed to equal portions of the inheritance [20]. I shall not here enter into the comparative merit of the Roman and the other constitutions in this particular, nor examine into the greater dignity of blood in the male or female sex: but shall only observe, that our present preference of males to females seems to have arisen entirely from the feodal law. For though our British ancestors, the Welsh, appear to have given a preference to males [i], yet our Danish predecessors (who succeeded them) seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance [k]. But the feodal law of the Saxons on the continent (which was probably brought over hither, and first altered by the law of king Canute) gives an evident preference of the male to the female sex. *Pater aut mater, defuncti, filio non filiæ hæreditatem relinquent. ..... Qui defunctus non filios sed filias reliquerit, ad eas omnis hæreditas pertineat* [l]." It is possible, therefore, that this preference might be a branch of that imperfect system of feuds, which obtained here before the conquest: especially as it subsists among the customs of gavelkind, and as, in the charter or laws of king

arises from feudal principles.

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[f] Numb. c. 27.
[g] Petit. LL. Attic. l. 6, t. 6.
[h] Inst. 3. 1. 6.
[i] Stat. Wall. 12 Edw. I.
[k] LL. Canut. c. 68.
[l] Tit. 7, §§ 1 & 4.

(20) But we find that by the Lex Voconia, *De Hereditatibus mulierum*, it was decreed that no one should make a woman his heir (ne quis hæredem virginem neque mulierem faceret); (Cic. Verr. 1, 42); nor leave to any one by way of legacy more than to his heir or heirs. But this law is supposed to have referred principally to those who were rich, in order to prevent the extinction of opulent families. (Adam's Roman Antiq. 214). And Dr. Adam says, that females were entirely excluded by the Roman law from inheriting. (Ib.) —[CHITTY.]

Henry the First, it is not (like many Norman innovations) given up, but rather enforced [m]. The true reason of preferring the males must be deduced from feodal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud [n], inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males; for, though daughters are excluded by sons, yet they succeed before any collateral relations; our law, like that of the Saxon feudists before mentioned, thus steering a middle course between the absolute rejection of females, and the putting them on a footing with males.

III. Primogeniture or descent to the eldest male;—Coparcenary or descent to all the females together.

III. A third rule or canon of descent is this: that where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together [21].

As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters; but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners [o].

Among what nations right of primogeniture prevailed.

This right of primogeniture in males seems antiently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance [p]; in the same manner as with us, by the laws of king Henry the First [q], the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence; and as the eldest daughter had afterwards the principal [215]

[m] C. 70. [n] 1 Feud. 8. [o] Litt. § 5. Hale, H. C. L. 238.
[p] Selden, De Succ. Ebr. c. 5. [q] C. 70.

(21) Daughters by different venters may inherit together as one heir to their common parent, though half blood is an impediment to the succession by descent from one to the other. Thus Lord Hale says, (History of the Com. Law, c. 11), "all the daughters, whether by the same or divers venters, do inherit together to the father."—[CHITTY.]

mansion, when the estate descended in coparcenary[r]. The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some among the males only. This is certainly the most obvious and natural way; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible[s], or (as they stiled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was farther enforced by the inconveniences that attended the splitting of estates; namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments[t]. These reasons occasioned an almost total change in the method of feodal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures: and in this condition the feodal constitution was established in England by William the Conqueror.

Descent of socage estates to all the sons

Yet we find, that socage estates frequently descended to all the sons equally, so lately as when Glanvil[u] wrote in the reign of Henry the Second; and it is mentioned in the Mirror[w], as a part of our antient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. However, in Henry the Third's time, we find by Bracton[x], that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands: except in Kent, where they gloried in the preservation of their antient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons[y];

before the reign of Henry III.

[216]

and subsequently in Kent.

[r] Glanvil, l. 7, c. 3.
[s] 2 Feud, 55.
[t] Hale, H. C. L. 221.
[u] L. 7, c. 3.
[w] C. 1, § 3.
[x] L. 2, c. 30, 31, 34.
[y] Somner, Gavelk. 7.

and except in some particular manors and townships, where their local customs continued the descent sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

Descent to all the females,

As to the females, they are still left as they were by the antient law: for they were all equally incapable of performing any personal service; and therefore one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute sub-division of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown[z]; wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honour. For, if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be countess, but the dignity is in suspence or abeyance till the king shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases[a] [22]. In which disposition is preserved a strong trace of the antient law of feuds, before their descent by primogenitur

except as to the crown

Dignities descend among females.

according to king's pleasure.

[z] Co. Litt. 165.

[a] Ibid.

(22) The king, in the case of coparceners of a title of honour, may direct which one of them and her issue shall bear it; and if the issue of that one become extinct, it will again be in abeyance, if there are descendants of more than one sister remaining. But upon the failure of the issue of all except one, the descendant of that one, being the sole heir, will have a right to claim and to assume the dignity. There are instances of a title, on account of a descent to females, being dormant, or in abeyance, for many centuries. (Harg. Co. Litt. 165). Lord Coke says, there is a difference in an office of honour, which shall be executed by the husband or deputy of the eldest. (Ib.). Yet when the office of great chamberlain had descended to two sisters, coheiresses of the Duke of Ancaster, one of whom was married to Peter Burrell, Esq.; the judges gave it as their opinion in the House of Lords, "that the office belongs to both sisters; that the husband of the eldest is not of right entitled to execute it; and that both sisters may execute it by deputy, to be approved of by them; such deputy not being of a degree inferior to a knight, and to be approved of by the king." (Ib.; et Journ. Dom. Proc. May 25, 1781).—[CHRISTIAN.] See also Parl. Reg. for 1780; Vol. 4, p. 258 to 297.

even among the males was established; namely, that the lord might bestow them on which of the sons he thought proper—"*progressum est, ut ad filios deveniret, in quem scilicet dominus hoc vellet beneficium confirmare* [b]."

IV. Lineal descendants represent their ancestor *in infinitum*.

[217]

IV. A fourth rule, or canon of descent, is this: that the lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor: that is, shall stand in the same place as the person himself would have done, had he been living.

Thus, the child, grandchild, or great-grandchild, either male or female, of the eldest son, succeeds before the younger son, and so *in infinitum* [c]. And these representatives shall take neither more nor less, but just so much as their principals would have done. As, if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte the surviving sister shall have six, and her six nieces, the daughters of Margaret, one a piece.

Which is called succession *in stirpes*;

This taking by representation is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish succession directed [d]; but the Roman somewhat differed from it. In the descending line, the right of representation continued *in infinitum*, and the inheritance still descended *in stirpes:* as, if one of three daughters died, leaving ten children, and then the father died; the two surviving daughters had each one third of his effects, and the ten grandchildren had the remaining third divided between them. And so among collaterals, if any person of equal degree with the persons represented were still subsisting (as, if the deceased left one brother, and two nephews, the sons of another brother), the succession was still guided by

[b] 1 Feud. 1. [c] Hale, H. C. L. 236, 237. [d] Selden, De. Succ. Ebr. c. 1.

the roots: but, if both the brethren were dead leaving issue, then (I apprehend) their representatives in equal degree became themselves principals, and shared the inheritance *per capita,* that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation[e]. So, if the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third; his inheritance by the Roman law was divided into six parts, and one given to each of the nieces: whereas the law of England in this case would still divide it only into three parts, and distribute it *per stirpes,* thus: one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother[23].

[218]

This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first-born among the males, to both which the Roman law is a stranger. For, if all the children of three sisters were in England to claim *per capita,* in their own right as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male and partly female; then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the first-born, among persons in equal degree. Whereas, by dividing the inheritance according to the roots, or *stirpes,* the rule of descent is kept uniform and steady: the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same: and among these several issues, or representatives of the respec-

and is a consequence of the preference of the male issue, and of the rule of primogeniture.

[e] Nov. 110, c. 3. Inst. 3. 1. 6.

(23) Representation is admitted in descents according to the custom of gavelkind or Borough-English, as well as in common-law descents; and generally, the canons of descent at the common law are applicable to all customary descents, so far as the peculiar incidents of the latter will allow. (2 Lord Raym. 1024; 1 Mod. 102; 1 P. Wms. 65).

tive roots, the same preference to males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As, if a man hath two sons, A. and B., and A. [219] dies leaving two sons, and then the grandfather dies; now the eldest son of A. shall succeed to the whole of his grandfather's estate: and if A. had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B. and his issue. But, if a man hath only three daughters, C., D., and E.; and C. dies leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son who is younger than his sister: here, when the grandfather dies, the eldest son of C. shall succeed to one third, in exclusion of the younger; the two daughters of D. to another third in partnership; and the son of E. to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards *in infinitum* [24].

Not established in time of Hen. II. nor

Yet this right does not appear to have been thoroughly established in the time of Henry the Second, when Glanvil wrote: and therefore, in the title to the crown especially, we find frequent contests between the younger (but surviving) brother and his nephew (being the son and representative of the elder deceased) in regard to the inheritance of their

(24) This right transferred by representation, is infinite and unlimited in the degrees of those that descend from the represented; for the son, the grandson, the great-grandson, and so all downwards *in infinitum*, enjoy the same privilege of representation as those from whom they derive their pedigree had. (Hale, C. L. c. 11). And from hence it follows, that the nearest relation is not always the heir at law; as the next cousin *jure representationis* is preferred to the next cousin *jure propinquitatis*. (Co. Litt. 10. b.). Proximity of blood, therefore, is twofold, either positive or representative. It is positive when the parties claim in their own individual right, as between the second and third son, or between the uncle and grand uncle. It is representative when either of the parties claims as being lineally descended from another, in which case he is entitled to the degree of proximity of his ancestor. Thus, the grandson of the elder son of any person proposed is entitled before the second son of such person, though in common acceptation nearer by two degrees; and this principle of representative proximity is by the law of England so peremptory, that a female may avail herself thereof to the total exclusion of a male claiming in his own right; for in descents in fee-simple, the daughter of the eldest son shall, as claiming by representation of her father, succeed in preference to the second or younger son. (See 3 Cru. Dig. 378, 379).—[CHITTY.]

common ancestor: for the uncle is certainly nearer of kin to the common stock, by one degree, than the nephew; though the nephew, by representing his father, has in him the right of primogeniture. The uncle also was usually better able to perform the services of the fief; and besides had frequently superior interest and strength, to back his pretensions and crush the right of his nephew. And even to this day, in the Lower Saxony, proximity of blood takes place of representative primogeniture; that is, the younger surviving brother is admitted to the inheritance before the son of an elder deceased: which occasioned the disputes between the two houses of Mecklenburg Schwerin and Strelitz, in 1692 [f]. Yet Glanvil, with us, even in the twelfth century, seems [g] to declare for the right of the nephew by representation; provided the eldest son had not received a provision in lands from his father, or (as the civil law would call it) had not been foris-familiated, in his lifetime. King [220] John, however, who kept his nephew Arthur from the throne, by disputing his right of representation, did all in his power to abolish it throughout the realm [h]: but in the time of his son, king Henry the Third, we find the rule indisputably settled in the manner we have here laid it down [i], and so it has continued ever since. And thus much for lineal descents [25].

until that of Hen. III.

[f] Mod. Un. Hist. xlii. 334.
[g] L. 7, c. 3.
[h] Hale, H. C. L. 217, 229.
[i] Bracton, l. 2, c. 30, § 2.

(25) "The right of representation was more slowly introduced into the collateral than into the descending line.

"In the original law of nature representation must be unknown; those who are nearest in blood to a man, will be conceived to be nearest connected with him. Afterwards, it is observed to be a hardship, that children bred up in a suitable rank to that of their father, and with a prospect of succeeding to his rights, should be cut off at once from that rank and that prospect. It comes to be observed as a farther hardship, that a woman who has married one seemingly her equal, should, by his untimely death, lose not only her husband, but see her children reduced to beggary.

"These considerations introduced the right of representation in the descending line: but the same considerations did not occur in the collateral line. The children of a brother or cousin have not the prospect of succeeding to their uncle's or cousin's estates, because, it is always to be supposed, every man is to have children of his own; it is therefore no hardship upon them to be removed by another uncle, or another cousin, from a succession which they could have no reasonable expectation of enjoying.

"The steps by which the right of

V. Collateral descent shall be to blood of first

V. A fifth rule is, that on failure of lineal descendants, or issue, of the person last seised, the inheritance shall de-

representation in private successions came into the collateral line in Great Britain, or even in any other country in Europe, are extremely difficult to be traced, and perhaps are not very certain when they are traced; therefore we must supply them by the progress of the same representation in public successions.

"In these last successions it is plain that representation was originally unknown. From the histories of modern Europe, it appears that when succession was permitted amongst collaterals, the nearest of blood took to the exclusion of representation.

"In the time of Edward I., though representation in the descending line was tolerably well established throughout Europe, yet the point was so doubtful in the collateral line, that upon the death of Margaret of Norway, and the dispute for her succession between her cousins Bruce and Baliol, not only the eighty Scotch commissioners named by the candidates, and the twenty-four English named by king Edward, were long doubtful, but all Europe was doubtful which side ought to prevail. The precise question in the end put by the king to the commissioners was,—*whether the more remote by one degree in succession, coming from the elder sister, ought to exclude the nearer by a degree, coming from the second sister?* And on the answer importing that representation should take place, judgment was given for Baliol.

"The Scotch writers of those days were positive this judgment was wrong; the English writers of the same period were as positive that it was right. These different opinions may be accounted for. In England at that time representation in collateral succession was beginning to take place, and this advance of their own nation the English made the measure of their opinion. The Scotch, on the other hand, at the same period, had not arrived at the same length; this species of representation was unknown to them; and therefore they disapproved of the judgment.

"Solemn as this decision was, yet even in England a century afterwards, the right of representation in this line was so far from being complete, that it was the same doubt that gave rise to the disputes between the houses of York and Lancaster, and involved the kingdom in civil war. On the abdication of Richard the Second, the two persons claiming the right to the crown were his two cousins, the duke of Lancaster, son of John of Gaunt, who was fourth son to Edward the Third, and the earl of March, grandson to Lionel duke of Clarence, who was third son of the same prince. And the discussions related to the rights of these persons, and whether representation in collateral successions ought to prevail.

"Even in later times, and when the law was better understood, it was on the same ground that, upon the death of Henry the Third of France, the League set up the cardinal of Bourbon as heir to the crown, in opposition to his nephew, the king of Navarre. This last prince was son of the elder branch to the cardinal; but the cardinal being one step nearer to the common stock, it was asserted that nearness of blood, and not representation, took place in collateral succession.

"For many ages it has now been fixed in private successions that representation in the collateral line shall take place; and although of late in Europe there has scarce been any such dispute in public successions as to give room for either example to prevail, yet the example of those private successions, and the now riveted notions of

scend to his collateral relations, being of the blood of the first purchasor; subject to the three preceding rules [26]. purchaser (subject to three preceding rules).

Thus, if Geoffrey Stiles purchases land, and it descends to John Stiles his son, and John dies seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey the first purchasor of this family [k 27]. The first purchasor, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

This is a rule almost peculiar to our own laws, and those of a similar original [28]. For it was entirely unknown among the Jews, Greeks, and Romans: none of whose laws looked any farther than the person himself who died seised of the estate; but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy [l] agrees with our law in this Rule peculiar to our own laws.

[k] Co. Litt. 12. [l] Gr. Coustum. c. 25.

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mankind in favour of representation, will probably prevent it from being ever made again the subject of dispute." (Dalrymple on Feuds, ch. 5, s. 2, p. 178).

(26) The purchaser here spoken of is frequently an imaginary person, as may be gathered from what follows in the text. Under the new law, the person to succeed must be not only of the blood of the purchaser, but also his heir. (Infra, p. 240, n.).

(27) To be of the blood of Geoffrey, is either to be immediately descended from *him*, or to be descended from the *same couple* of common ancestors. Two persons are *consanguinei*, or are of the blood (that is, whole blood) of each other, who are descended from the same two ancestors.

The heir and ancestor must not only have two common ancestors with the original purchaser of the estate, but must have two common ancestors with each other; and therefore if the son purchases lands and dies without issue, and it descends to any heir on the part of the father, if the line of the father should afterwards become extinct, it cannot pass to the line of the mother. (Hale's Hist. C. L. 246; 49 E. III. 12). And for the same reason, if it should descend to the line of any female, it can never afterwards, upon failure of that line, be transmitted to the line of any other female; for, according to the next rule, viz. the sixth, the heir of the person last seised must be a collateral kinsman of the whole blood.—[CHRISTIAN.]

(28) The custom of Borough-English is most commonly confined to lineal descents; and on failure of issue of the owner of the fee, his eldest brother will take. But the partible descent of gavelkind land extends to collaterals. (Rob. Gav., b. 1, c. 6). Descents *according to* the custom of gavelkind are regulated by the special custom of each place. (Vide ante, p. 85, n. (8)).

respect: nor indeed is that agreement to be wondered at, since the law of descents in both is of feodal original; and this rule or canon cannot otherwise be accounted for than by recurring to feodal principles.

Origin of the rule.

When feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is, lineally [221] descended from, the first feudatory or purchasor. In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. To this purpose speaks the following rule: "*frater fratri, sine legitimo hærede defuncto, in beneficio quod eorum patris fuit succedat: sin autem unus e fratribus a domino feudum acceperit, eo defuncto sine legitimo hærede, frater ejus in feudum non succedit*[m]." The true feodal reason for which rule was this: that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person. And therefore, as in estates-tail, (which a proper feud very much resembled), so in the feodal donation, "*nomen hæredis, in prima investitura expressum, tantum ad descendentes ex corpore primi vasalli extenditur; et non ad collaterales, nisi ex corpore primi vasalli sive stipitis descendant*[n]:" the will of the donor, or original lord, (when feuds were turned from life estates into inheritances), not being to make them absolutely hereditary, like the Roman *allodium*, but hereditary only *sub modo;* not hereditary to the collateral relations, or lineal ancestors, or husband, or wife of the feudatory, but to the issue descended from his body only.

Feudum novum not to be held *ut antiquum.*

However, in process of time, when the feodal rigor was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum;* that is, with all the qualities annexed of a feud derived

[m] 1 Feud. 1, § 2. [n] Craig. l. 1, t. 9, § 36.

from his ancestors; and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is descended from, the first imaginary purchasor. For, since it is not ascertained in such general grants, whether this feud shall be held *ut feudum paternum*, or *feudum avitum*, but *ut feudum antiquum* merely; as a feud of indefinite antiquity; that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have descended; the law will not ascertain it, but will suppose *any* of his ancestors, *pro re natâ*, to have been the first purchasor: and therefore it admits *any* of his collateral kindred (who have the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors. [222]

Every grant and conveyance of a fee-simple is a *feudum novum*, to be held *ut antiquum*.

Of this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut novum*; unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchasor) are admitted; but every grant of lands in fee-simple is with us a *feudum novum* to be held *ut antiquum*, as a feud whose antiquity is indefinite: and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance [29].

The previous descent regarded when it can be traced.

Yet, when an estate hath really descended in a course of inheritance to the person last seised, the strict rule of the feodal law is still observed; and none are admitted, but the heirs of those through whom the inheritance hath passed: for all others have demonstrably none of the blood of the

(29) An estate is purchased by a younger brother, and on his death without issue descends to his elder brother, *because* the estate is supposed to have always been in the family, and therefore the elder brother is the heir. This offer of the supposition that that happened which could never by any possibility have happened, namely, a descent to a younger brother, as a reason why the elder brother should be his heir, is no pleasantry of the commentator's, but a fair specimen of that kind of reasoning with which, in other places, he endeavours to put off his readers from examining the grounds of more important matters than canons of inheritance.

first purchasor in them, and therefore shall never succeed [30]. As, if lands come to John Stiles by descent from his mother Lucy Baker, no relation of his father (as such) shall ever be his heir of these lands; and, *vice versa*, if they descended from his father Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, George Stiles, the relations of his father's mother, Cecilia Kempe, shall for the same reason never be admitted, but only those
[223] of his father's father [31]. This is also the rule of the French law °, which is derived from the same feodal fountain [32].

Here we may observe, that so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as, if it be not known whether his grandfather, George Stiles, inherited it from his father, Walter Stiles, or his mother, Christian Smith; or, if it appear that his grandfather was the first

° Domat. part 2, pr.

(30) It happens that two estates or titles, the one legal, and the other equitable, descend upon the same person, in which case they become united, and the equitable follows the line of descent through which the legal estate descended. (Dougl. 771). And in the case of *Langley* v. *Sneyd*, (1 Sim. & St. 45), where an infant died seised of an equitable estate, descending *ex parte maternâ*, the legal estate being vested in trustees, his incapacity to call for a conveyance of the legal estate (by which the course of descent might have been broken), was held not to be a sufficient reason to induce a court of equity to consider the case as if such a conveyance had actually been made; it not being, according to the terms of the trust, any part of the express duty of the trustees to execute such conveyance.

(31) Hence the expression "heir-at-law" must always be used with a reference to a specific estate; for if an only child has taken by descent an estate from his father, and another from his mother, upon his death without issue, these estates will descend to two different persons: so also, if his two grandfathers and two grandmothers had each an estate which descended to his father and mother, whom I suppose also to be only children, then, as before, these four estates will descend to four different heirs.—[CHRISTIAN.]

(32) The Code Civil has abolished this rule:—"La loi ne considère ni la nature ni l'origine des biens, pour en regler la succession." (L. 3, tit. 1, s. 732).

grantee, and so took it (by the general law) as a feud of indefinite antiquity; in either of these cases the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles of this estate: because, in the first case, it is really uncertain, and, in the second case, it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

Principal rule of collateral descent.

This then is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchasor; or, that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have originally descended: according to the rule laid down in the year books [p], Fitzherbert [q], Brook [r], and Hale [s], "that he who would have been heir to the father of the deceased" (and, of course, to the mother, or any other real or supposed purchasing ancestor) "shall also be heir to the son;" a maxim, that will hold universally, except in the case of a brother or sister of the half blood, which exception (as we shall see hereafter) depends upon very special grounds.

The rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor was; which *in feudis vere antiquis* has in process of time been forgotten, and is supposed so to be in feuds that are held *ut antiquis*. [224]

VI. Collateral heir to be next collateral kinsman of whole blood,

VI. A sixth rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood [33].

[p] M. 12 Edw. IV. 14. [q] Abr. t. *Discent*, 2. [r] Abr. t. *Discent*, 38. [s] H. C. L. 243.

(33) "In order to constitute a good title, the party must be the nearest collateral heir of the whole blood of the person last seised on the part of the ancestor through whom the estate descended. When Lord Hale speaks of the nearest collateral relation of the whole blood of the person last seised, and of the blood of the first purchaser, he means the latter branch of the expression as a qualification, and not an addition to the first branch, that the collateral heir of the whole blood must claim through the ancestor from whom the estate descended, and thus be of the blood of the first purchaser." (Per Sir John Leach, V. C., 1 Sim. & St. 257).

either in his own right or by right of representation.

First, he must be his next collateral kinsman, either personally or *jure representationis;* which proximity is reckoned according to the canonical degrees of consanguinity before mentioned[34]. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great nephew but also his first cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him: so that the great nephew is related in the third canonical degree to the person proposed, and the first cousin in the second; the former being distant three degrees from the common ancestor, (the father of the *propositus*), and therefore deriving only one fourth of his blood from the same fountain; the latter, and also the *propositus* himself, being each of them distant only two degrees from the common ancestor (the grandfather of each), and therefore having one half of each of their bloods the same. The common law regards consanguinity principally with respect to descents; and, having therein the same object in view as the civil, it may seem as if it ought to proceed
[225] according to the civil computation. But, as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts its

Nature of consanguinity.

(34) This is only true in the paternal line; for when the paternal and maternal lines are both admitted to the inheritance, the most remote collateral kinsman *ex parte paternâ* will inherit before the nearest *ex parte maternâ*. (See p. 236, post).—[CHRISTIAN.]

degrees in the same manner. Indeed, the designation of person, in seeking for the next of kin, will come to exactly the same end, (though the degrees will be differently numbered), whichever method of computation we suppose the law of England to use; since the right of representation, of the parent by the issue, is allowed to prevail *in infinitum* [35]. This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degree of kindred; as, (for instance), uncles and nephews of the deceased; which multiplicity, though no material inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, is established. The issue or descendants therefore of John Stiles's brother are all of them in the first degree of kindred with respect to inheritances, those of his uncle in the second, and those of his great uncle in the third; as their respective ancestors, if living, would have been; and are severally called to the succession in right of such their representative proximity.

Statement of rule.

The right of representation being thus established, the former part of the present rule amounts to this; that, on failure of issue of the person last seised, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if John Stiles dies without issue, his estate shall descend to Francis his brother, or his representatives; he being lineally descended from Geoffrey Stiles, John's next immediate ancestor, or father. On failure of brethren or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*. Very si-

(35) The Editor conceives, that the true and only way of ascertaining an heir-at-law in any line or branch, is by the representation of brothers or sisters in each generation, and that the introduction of the computation of kindred, either by the canon or civil law, into a treatise upon descents, may perplex, and can never assist; for, if we refer this sixth rule either to the civil or canon law, it will, in many instances, be erroneous. It is certain that a great-grandson of the father's brother will inherit before a son of the grandfather's brother; yet, the latter is the *next collateral kinsman*, according to both the canon and civil-law computation; for the former is in the fourth degree by the canon, and the sixth by the civil law; the latter is in the third by the canon, and the fifth by the civil law; but in the descent of real property the former must be preferred.—[CHRISTIAN.]

milar to which was the law of inheritance among the antient Germans, our progenitors: "*hæredes successoresque, sui cuique liberi, et nullum testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patrui, avunculi*[t]."

[226]

Lineal ancestors are the common stocks from whence collateral heir to be found.

Now here, it must be observed, that the lineal ancestors though, (according to the first rule), incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore, in the Jewish law, which in this respect entirely corresponds with ours[u], the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue; who are held to succeed not in their own rights, as brethren, uncles, &c., but in right of representation, as the offspring of the father, grandfather, &c. of the deceased[w]. But, though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to *name* him in making out the pedigree or descent. For the descent between two brothers is held to be an *immediate* descent; and therefore title may be made by one brother or his representatives *to* or *through* another, without mentioning their common father[x 36]. If Geoffrey

[t] Tacitus De Mor. Germ. 21.
[u] Numb. c. 27.
[w] Selden, De Succ. Ebr. c. 12.
[x] 1 Sid. 196. 1 Ventr. 423. 1 Lev. 60. 12 Mod. 619.

(36) See Orl. Bridgm. 410. The law is now different, it being enacted by the stat. 3 & 4 Will. 4, c. 106, s. 5, "that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent."

The doctrine of immediate descent between brothers and sisters was formerly important, on account of the rule, that, as an alien had no inheritable blood in him, descent could not be traced through him; it being held, in the case of *Collingwood* v. *Pace*, (Orl. Bridgm. 410; 1 Vent. 413), that brothers, natural-born subjects, born of alien parents, might inherit to each other, as not needing to trace their descent through their parents. (See Co. Litt. 8. a.). This difficulty was removed in other cases by the statutes 11 & 12 Will. 3, c. 6, and 25 Geo. 3, c. 39, allowing descents to be traced through alien parents, provided the person claiming through them was in existence, and capable of taking at the death of the person last seised; which proviso does not prevent the devesting of an estate out of the daughter of an alien, on the birth of a brother or sister. (Infra, p. 251). The rule that a descent cannot be traced through a person attainted has also been abolished. (Stat. 3 & 4 Will. 4, c. 106, s. 10).

Stiles hath two sons, John and Francis, Francis may claim as heir to John without naming their father Geoffrey; and so the son of Francis may claim as cousin and heir to Matthew the son of John, without naming the grandfather; *viz.* as son of Francis, who was the brother of John, who was the father of Matthew. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood; and therefore, in order to ascertain the collateral heir of John Stiles, it is first necessary to recur to his ancestors in the first degree; and, if they have left any other issue besides John, that issue will be his heir. On default of such, we must ascend one step higher, to the ancestors in the second degree, and then to those in the third, and fourth, and so upwards, *in infinitum;* till some couple of ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent; and in such derivation the same rules must be observed, with regard to sex, primogeniture, and representation, that [227] have before been laid down with regard to lineal descents from the person of the last proprietor.

But, secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo;* that is, he must be the nearest kinsman of the *whole* blood; for if there be a much nearer kinsman of the *half* blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded; nay, the estate shall escheat to the lord, sooner than the half blood shall inherit [37]. Exclusion of half blood.

A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath, (so far as the distance of degrees will permit), all the same ingredients in the composition of his blood that the other hath. Thus, the blood of John Stiles being composed of those of Geoffrey Who are of the whole blood.

(37) It is always intended, or presumed, that a person is of the whole blood until the contrary be shewn. (Kitch. 225 a; Plowd. 77 a; Trin. 19 H. 8, pl. 6, p. 11 b; Watk. Desc. 75, n. (u)).—[CHITTY.]

Stiles his father, and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles; or he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and hath issue by him; the blood of this issue, being compounded of the blood of Lucy Baker, (it is true), on the one part, but that of Lewis Gay, (instead of Geoffrey Stiles), on the other part, it hath therefore only half the same ingredients with that of John Stiles; so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A. and B., by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A., who enters thereon, and dies seised without issue; still B. shall not be heir to this estate, because he is only of the half blood to A., the person last seised: but it shall descend to a sister (if any) of the whole blood to A.: for, in such cases, the
[228] maxim is, that the seisin or *possessio fratris facit sororem esse hæredem.* Yet, had A. died without entry, then B. might have inherited; not as heir to A. his half brother, but as heir to their common father, who was the person last actually seised [y] [38].

Half blood, why excluded.

This total exclusion of the half blood from the inherit-

[y] Hale, H. C. L. 238.

(38) The meaning of the maxim is, that the possession of a brother will make his sister of the whole blood his heir in preference to a brother of the half blood. (Litt. s. 58).

Of some inheritances there cannot be a seisin, or a *possessio fratris;* as if the eldest brother dies before a presentation to an advowson, it will descend to the half brother as heir to the person last seised, and not to the sister of the whole blood. (1 Burn, Ec. 11). So of reversions, remainders, and executory devises, there can be no seisin, or *possessio fratris;* and if they are reserved or granted to A. and his heirs, he who is heir to A. when they come into possession is entitled to them by descent; that is, that person who would have been heir to A., if A. had lived so long, and had then died actually seised. (2 Wood. 256; Fearne, 448; 2 Wils. 29).—[CHRISTIAN.] It may also be observed, that if the father die without heirs male, his daughters by different venters may inherit together to the father, although they cannot inherit to each other. (Bro. Abr., *Discent*, pl. 20; 1 Roll. Abr. 627).—[CHITTY.]

ance, being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule, to carry a former into execution. And here we must again remember, that the great and most universal principle of collateral inheritances being this, that the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchasor, that is derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchasor, and to shew that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchasor, and thereby the proof of an actual descent from him became impossible; then the law substituted what Sir Martin Wright[z] calls a *reasonable*, in the stead of an *impossible*, proof: for it remits the proof of an actual descent from the first purchasor; and only requires in lieu of it, that the claimant be next of the whole blood to the person last in possession, (or derived from the same couple of ancestors), which will probably answer the same end as if he could trace his pedigee in a direct line from the first purchasor. For he who is my kinsman of the whole blood can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are *vice versa* his: he therefore is very likely to be derived from that unknown ancestor of mine from whom the inheritance descended. But a kinsman of the half blood has but one half of his ancestors above the common stock the same as mine; and therefore there is not the same probability of that standing requisite in the law, that he be derived from the blood of the first purchasor.

To illustrate this by example. Let there be John Stiles, and Francis, brothers by the same father and mother, and another son of the same mother by Lewis Gay, a second husband. Now, if John dies seised of lands, but it is uncertain whether they descended to him from his father or [229] Rule exemplified.

[z] Tenures, 185.

mother; in this case his brother Francis, of the whole blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchasor, whether it were the line of the father or the mother. But, if Francis should die before John, without issue, the mother's son by Lewis Gay (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his descent from the first purchasor, who is unknown, nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely *not to be* descended from the line of the first purchasor, as *to be* descended; and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood.

And, as this is the case *in feudis antiquis*, where there really did once exist a purchasing ancestor, who is forgotten; it is also the case *in feudis novis* held *ut antiquis*, where the purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands in fee-simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchasor (and not his own offspring only) may inherit them, provided they be of the whole blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood are excluded, for want of the same probability. Nor should this be thought hard, that a brother of the purchasor, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law: since it is only upon a like supposition and fiction, that brethren of purchasors (whether of the whole or half blood) are entitled to inherit at all; for we have seen that, *in feudis stricte novis*, neither
[230] brethren nor any other collaterals were admitted. As therefore *in feudis antiquis* we have seen the reasonableness of excluding the half blood, if by a fiction of law a *feudum novum* be made descendible to collaterals as if it was *feudum antiquum*, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

Rule farther illustrated.

Perhaps by this time the exclusion of the half blood does

not appear altogether so unreasonable as at first sight it is apt to do. It is certainly a very fine-spun and subtle nicety: but considering the principles upon which our law is founded, it is not an injustice, nor always a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals; and though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. The doctrine of the whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchasor, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. I speak with these restrictions, because it does not, neither can any other method answer this purpose entirely. For though all the ancestors of John Stiles, above the common stock, are also the ancestors of his collateral kinsman of the whole blood; yet unless that common stock be in the first degree, (that is, unless they have the same father and mother), there will be intermediate ancestors, below the common stock, that belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other ancestors than what are in common to them both; yet with regard to his uncle, where the common stock is removed one degree higher, (that is, the grandfather and grandmother), one half of John's ancestors will not be the ancestors of his uncle: his *patruus*, or father's brother, derives not his descent from John's maternal ancestors: nor his *avunculus*, or mother's brother, from those in the paternal line. Here then the supply of [231]
proof is deficient, and by no means amounts to a certainty: and the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that (upon the same principles of calculation) the half blood have always a much less chance to be descended from an unknown indefinite ancestor of the deceased, than the whole blood in the same degree. As, in the first degree, the whole brother of John Stiles is sure to be descended from that unknown ancestor; his half brother has only an even chance,

for half John's ancestors are not his. So, in the second degree, John's uncle of the whole blood has an even chance; but the chances are three to one against his uncle of the half-blood, for three-fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against John's great uncle of the whole blood, but they are seven to one against his great uncle of the half blood, for seven-eighths of John's ancestors have no connexion in blood with him. Therefore, the much less probability of the half blood's descent from the first purchasor, compared with that of the whole blood, in the several degrees, has occasioned a general exclusion of the half blood in all.

Unjust extension of the rule,

But, while I thus illustrate the reason of excluding the half blood in general, I must be impartial enough to own, that, in some instances, the practice is carried farther than the principle upon which it goes will warrant. Particularly when a kinsman of the whole blood in a remoter degree, as the uncle or great uncle, is preferred to one of the half blood in a nearer degree, as the brother; for the half brother hath the same chance of being descended from the purchasing ancestor as the uncle; and a thrice[39] better chance than the great uncle or kinsmen in the third degree. It is also more especially overstrained, when a man has two sons by different venters, and the estate on his death descends from him to the eldest, who enters and dies without issue; in which case the younger son cannot inherit this estate, because he is not of the whole blood to the last proprietor[a].

[a] A still harder case than this happened, (M. 10 Edw. III.). On the death of a man, who had three daughters by a first wife, and a fourth by another, his lands descended equally to all four as coparceners. Afterwards, the two eldest died without issue: and it was held, that the third daughter alone should inherit their shares, as being their heir of the whole blood; and that the youngest daughter should retain only her original fourth part of their common father's lands. (10 Ass. 27). And yet it was clear law in M. 19 Edw. II., that where lands had descended to two sisters of the half blood, as coparceners, each might be heir of those lands to the other. (Mayn. Edw. II. 628; Fitzh. Abr. tit. *Quare Impedit*, 177).

(39) This ought to be *twice;* for the half brother has one chance in two, the great uncle one in four; the chance of the half brother is therefore twice better than that of the great uncle.—[CHRISTIAN.]

This, it must be owned, carries a hardship with it, even upon feodal principles: for the rule was introduced only to supply the proof of a descent from the first purchasor; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it is demonstrable that the half brother must be of the blood of the first purchasor, who was either the father or some of the father's ancestors. When, therefore, there is actual demonstration of the thing to be proved, it is hard to exclude a man by a rule substituted to supply that proof when deficient. So far as the inheritance can be evidently traced back, there seems no need of calling in this presumptive proof, this rule of probability, to investigate what is already certain. Had the elder brother indeed been a purchasor, there would have been no hardship at all, for the reasons already given: or had the *frater uterinus* only, or brother by the mother's side, been excluded from an inheritance which descended from the father, it had been highly reasonable.

as in case of *frater consanguineus.*

Indeed, it is this very instance of excluding a *frater consanguineus*, or brother by the father's side, from an inheritance which descended *à patre*, that Craig[b] has singled out on which to ground his strictures on the English law of half blood. And, really, it should seem as if originally the custom of excluding the half-blood in Normandy[c] extended only to exclude a *frater uterinus*, when the inheritance descended *à patre*, and *vice versa*, and possibly in England also; as even with us it remained a doubt, in the time of Bracton[d], and of Fleta[e], whether the half blood on the father's side was excluded from the inheritance which originally descended from the common father, or only from such as descended from the respective mothers, and from newly-purchased lands. So also the rule of law, as laid down by our Fortescue[f], extends no farther than this: [233] *frater fratri uterino non succedet in hæreditate paterna.* It is, moreover, worthy of observation, that by our law, as it now stands, the crown (which is the highest inheritance in the nation) may descend to the half-blood of the preceding sovereign[g], so that it be the blood of the first monarch

Rule of excluding half blood does not apply to the crown.

[b] L. 2, t. 15, § 14.
[c] Gr. Coustum. c. 25.
[d] L. 2, c. 30, § 3.
[e] L. 6, c. 1, § 14.
[f] De Laud. LL. Angl. 5.
[g] Plowd. 245. Co. Litt. 15.

purchasor, or (in the feodal language) conqueror of the reigning family. Thus it actually did descend from king Edward the Sixth to queen Mary, and from her to queen Elizabeth, who were respectively of the half-blood to each other. For, the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock, which was formerly king William the Norman, and is now (by act of Parliament [h]) the princess Sophia of Hanover. Hence also it is that in estates-tail, where the pedigree from the first donee must be strictly proved, half-blood is no impediment to the descent [i]: because, when the lineage is clearly made out, there is no need of this auxiliary proof [40]. How far it might be desirable for the legislature to give relief, by amending the law of descents in one or two instances, and ordaining that the half-blood might always inherit, where the estate notoriously descended from its own proper ancestor, and in cases of new-purchased lands, or uncertain descents, should never be excluded by the whole blood in a remoter degree; or how far a private inconvenience should be still submitted to, rather than a long-established rule should be shaken, it is not for me to determine [41].

nor to estates-tail.

Summary of grounds of the rule.

The rule then, together with its illustration, amounts to this: that, in order to keep the estate of John Stiles as

[h] 12 Will. III. c. 2.

[i] Litt. § 14, 15.

(40) Another reason in the case of entails is, that the issue in tail do not take successively by descent from their predecessor, but each takes by way of remainder under the original limitation. (*Nicolls* v. *Sheffield*, 2 Br. C. C. 215). In titles of honour, also, half blood is no impediment to the descent: a title being a species of entail, and only transmissible to those who are descended from the person first ennobled. (Co. Litt. 15). Half blood does not obstruct the succession to personalty. (P. 505).

(41) So early as the 46th year of Edward the Third's reign, the Commons petitioned against this exclusion of the half blood. (Petitions in Parliament, vol. 2, p. 314).

An inheritance might indirectly have gone to the half blood, as it might have indirectly gone to a lineal ancestor. "If there be two brothers by divers venters, and the elder is seised of land in fee and die without issue, and his uncle enter as next heir to him, who also dies without issue, now the younger brother may have the land as heir to the uncle, for that he is of the whole blood to him, albeit he be but of the half blood to his elder brother." (Litt. sect. 8).

nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the nearest couple of ancestors that have left descendants behind them; because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor, as those who are descended from both [42].

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(42) "As my Lord Hale said in the case of *Collingwood* v. *Pace*, (1 Vent. 424), the brother of the half blood is nearer than the uncle, and is therefore preferred in the administration; for the uncle on the part of the father hath no more blood of the mother than the brother of the second venter, and he hath the immediate blood of the father, which the uncle hath not; the uncle is forced to go up to the grandfather and meet the blood of the nephew in him; so that it is impossible to find out a reason in nature for preferring the uncle to the half brother. Indeed, he offers a legal reason for it, which is this, viz. that our law, agreeing with the canon law, makes brother and brother but one degree, and uncle and nephew two degrees; and thereby the law gives a mediate descent to the uncle, mediante patre; but the descent to the brother must be immediate, if at all, and my Lord Hale holds that the half blood impedes it. But now let us examine this. Our law, taking the computation of degrees of kindred from the canon law, (which, by the way, shortened the degrees or distance of relation in order to increase the number of dispensations from the court of Rome), makes brother and brother but one degree; whereas the civil law, in its computation, went up to the common parent or father, and down again to the persona proposita, and so made brother and brother two degrees, which is certainly right, for there is no consanguinity among collaterals but by meeting of the blood in some common person or parent; but now, taking our law to be right, why should the half blood impede the descent to the heir on the part of the father; why should the blood of a different mother hinder the descent to the heir of the father, especially when it is considered that neither of the competitors hath any of the mother's blood, as hath been observed? These seem considerations of weight, but still sitting in a legal judicature, I must judge of the plaintiff's claim as the law is, and not as I would have it." (Per Sir J. Jekyll, M. R., 2 P. Wms. 735).

Our author introduces his account of the rule which excludes the half blood by describing it to be, not an arbitrary principle, but a mere "rule of evidence, calculated to investigate who the purchasing ancestor was." After explaining that when a man purchases an estate, and dies leaving no issue, but an elder brother of the whole blood, that brother shall be his heir, *because* the fee is supposed to be feudum antiquum, and the elder brother of the whole blood is most likely to be the heir of the person from whom the fee is supposed to have descended to the younger brother—because, in short, that is most probable which is utterly impossible, namely, that an estate should have descended from the common ancestor to the *younger* son,—our author proceeds to give us reasons why, if the elder brother is only of the half blood to the purchaser, he shall not inherit, but rather the estate shall escheat. And the principal reason is this,—that my kinsman of the whole blood can have no ancestors beyond or higher than the common stock but what are equally my ancestors also, and mine are vice versâ his; he therefore is very likely to be derived from

But here another difficulty arises. In the second, third, fourth, and every superior degree, every man has many couples of ancestors, increasing according to the distances in a geometrical progression upwards [k], the descendants of all which respective couples are (representatively) related to him in the same degree. Thus, in the second degree, the issue of George and Cecilia Stiles and of Andrew and

[k] See page 204.

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that unknown ancestor from whom the inheritance descended. But a kinsman of the half blood has but one-half of his ancestors above the common stock the same as mine, and therefore there is not the *same* probability that he is derived from the blood of the first purchaser. This is the reason for *excluding* the half blood, even when no other person can set up *any* probability that he is of the blood of the imaginary ancestor—this is the reason for preferring a paternal uncle, or any remoter kinsman on the father's side, to the half brother on the same side; the paternal uncle being preferred to any kinsman on the mother's side, because the probability is that the inheritance descended in the male line, i. e. from the father; the brother of the half blood, the heir of the father from whom the estate is supposed to have descended, being excluded, because as the estate may have come from either side, he has only half a chance of being related to that side on which it did come; although the uncle, who stands in precisely the same position, and who cannot make out his own title until he has shewn a better title in point of probability in the half brother, is admitted, as, on failure of any uncle or his issue, a great uncle or his issue would be admitted, although their chance is only half as good as that of the half brother; the fact being, that in the majority of cases the kinsman of the half blood who is excluded has a better chance of being related to the supposed ancestor than the kinsman of the whole blood who is admitted. Such is the value of our author's defence of the exclusion of the half blood,—a defence of which he fully understood the weakness, since he has himself taken the pains to explain and illustrate its deficiencies. When a writer carries his determination to approve and defend whatever he finds established to the length of excusing a mere accidental blemish in the law—involving no principle of policy, affecting no interest, favouring no class—by reasons which he himself acknowledges to be worthless, what value can we put upon his advocacy of more important rules of the law, or principles or precedents of the constitution?

Ready as the Commentator is to insult his readers with puerile fallacies, rather than leave an old dogma unbacked, and convinced, as he evidently is, that, whether founded on correct legal reasoning or not, the rule is in effect barbarous and unjust, yet he shrinks from deciding whether "a private inconvenience should be submitted to rather than a long-established rule should be shaken:" so fearful is he of favouring a precedent for innovation in more important matters, and so resolved upon acting up to his declaration that there never was any innovation upon a standing rule of law that did not in the end prove the wisdom of the old rule by the inconveniences that followed its abrogation.

The student will find in a subsequent note, (p. 240), that this long-established rule has been abolished by the legislature.

Esther Baker, the two grandsires and grandmothers of John Stiles, are each in the same degree of propinquity; in the third degree, the respective issues of Walter and Christian Stiles, of Luke and Frances Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior degrees) all equally entitled to call themselves the next kindred of the whole blood to John Stiles. To which, therefore, of these ancestors must we first resort, in order to find out descendants to be preferably called to the inheritance? In answer to this, and likewise to avoid all other confusion and uncertainty that might arise between the several stocks wherein the purchasing ancestor may be sought for, another qualification is requisite, besides the *proximity* and *entirety*, which is that of *dignity* or *worthiness*, of blood. For,

VII. Preference of male stocks to female, unless estate descended from a female.

VII. The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female, (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near),—unless where the lands have, in fact, descended from a female.

Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all[l]; and the relations of the father's father, before those of the father's mother; and so on. And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden[m], and Petit[n]; though among the Greeks in the time of Hesiod[o], when a man died without wife or children, all his kindred (without any distinction) divided his estate among them. [235] It is likewise warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati* or relations by the mother, till the edict of the emperor Justinian[p] abolished all distinction between them. It is also comformable to the customary law of Normandy[q], which indeed in most respects agrees with our English law of inheritance.

[l] Litt. § 4.
[m] De Succ. Ebræor. c. 12.
[n] LL. Attic. l. 1, t. 6.
[o] Θεογον. 606.
[p] Nov. 118.
[q] Gr. Coustum, c. 25.

Reason of this rule with a view to estate to blood of first purchasor.

However, I am inclined to think, that this rule of our law does not owe its immediate original to any view of conformity to those which I have just now mentioned; but was established in order to effectuate and carry into execution the fifth rule, or principal canon of collateral inheritance, before laid down; that every heir must be of the blood of the first purchasor. For, when such first purchasor was not easily to be discovered after a long course of descents, the lawyers not only endeavoured to investigate him by taking the next relation of the whole blood to the person last in possession, but also, considering that a preference had been given to males (by virtue of the second canon) through the whole course of lineal descent from the first purchasor to the present time, they judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors; from the father (for instance) rather than from the mother; from the father's father, rather than from the father's mother; and therefore they hunted back the inheritance (if I may be allowed the expression) through the male line; and gave it to the next relations on the side of the father, the father's father, and so upwards; imagining with reason that this was the most probable way of continuing it in the line of the first purchasor. A conduct much more rational than the preference of the *agnati*, by the Roman laws: which, as they gave no advantage to the males in the first instance or direct lineal succession, had no reason for preferring them in the transverse collateral one: upon which account this preference was very wisely abolished by Justinian.

[236] That this was the true foundation of the preference of the *agnati* or male stocks, in our law, will farther appear, if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed; and no relation of his by the father's side, as such, can ever be admitted to them; because he cannot possibly be of the blood of the first purchasor. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also, if they in fact descended to John Stiles from his father's mother Cecilia Kempe; here not only the blood of Lucy Baker his mother, but also of George Stiles his father's father, is per-

petually excluded. And, in like manner, if they be known to have descended from Frances Holland the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but also of Luke Kempe the father of Cecilia, is excluded. Whereas, when the side from which they descended is forgotten, or never known, (as in the case of an estate newly purchased to be holden *ut feudum antiquum*), here the right of inheritance first runs up all the father's side, with a preference to the male stocks in every instance; and, if it finds no heirs there, it then, and then only, resorts to the mother's side; leaving no place untried, in order to find heirs that may by possibility be derived from the original purchasor. The greatest probability of finding such was among those descended from the male ancestors; but upon failure of issue there, they may possibly be found among those derived from the females.

This I take to be the true reason of the constant preference of the agnatic succession, or issue derived from the male ancestors, through all the stages of collateral inheritance; as the ability for personal service was the reason for preferring the males at first in the direct lineal succession. We see clearly, that if males had been perpetually admitted, in utter exclusion of females, the tracing the inheritance back through the male line of ancestors must at last have inevitably brought us up to the first purchasor: but as males have not been *perpetually admitted,* but only *generally preferred;* as females have not been *utterly excluded,* but only *generally postponed* to males; the tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchasor; which, joined with the other probability, of the wholeness or entirety of blood, will fall little short of a certainty. [237]

Before we conclude this branch of our inquiries, it may not be amiss to exemplify these rules by a short sketch of the manner in which we must search for the heir of a person, as *John Stiles,* who dies seised of land which he acquired, and which therefore he held as a feud of indefinite antiquity[r]. Rules of descent exemplified with reference to table.

In the first place succeeds the eldest son, Matthew Stiles,

[r] See the Table of Descents annexed.

or his issue: (No. 1.)—if his line be extinct, then Gilbert Stiles and the other sons, respectively, in order of birth, or their issue: (No. 2.)—in default of these all the daughters together, Margaret and Charlotte Stiles, or their issue: (No. 3.)—On failure of the descendants of *John Stiles* himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in: viz. first, Francis Stiles, the eldest brother of the whole blood, or his issue: (No. 4.)—then Oliver Stiles, and the other whole brothers, respectively, in order of birth, or their issue: (No. 5.)—then the sisters of the whole blood all together, Bridget and Alice Stiles, or their issue: (No. 6.)—In defect of these, the issue of George and Cecilia Stiles, his father's parents; respect being still had to their age and sex: (No. 7.)—then the issue of Walter and Christian Stiles, the parents of his paternal grandfather: (No. 8.)—then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's father: (No. 9.)—and so on in the paternal grandfather's paternal line, or blood of Walter Stiles, *in infinitum*. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother: (No. 10.)—and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum*: till both the immediate bloods of George Stiles, the paternal grandfather, are spent.—Then we must resort to the issue of
[238] Luke and Frances Kempe, the parents of *John Stiles's* paternal grandmother: (No. 11.)—then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (No. 12.)—and so on in the paternal grandmother's paternal line, or blood of Luke Kempe, *in infinitum*.—In default of which we must call in the issue of Charles and Mary Holland, the parents of his paternal grandmother's mother: (No. 13.)—and so on in the paternal grandmother's maternal line, or blood of Frances Holland, *in infinitum*; till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent.—Whereby the paternal blood of *John Stiles* entirely failing recourse must then, and not before, be had to his maternal relations; or the blood of the Bakers (Nos. 14, 15, 16), Willis's (No. 17), Thorpe's (Nos. 18, 19), and White's (No. 20), in the same regular successive order as in the paternal line.

Argument in favour of No. 10.

The student should however be informed, that the class, No. 10, would be postponed to No. 11, in consequence of the doctrine laid down, *arguendo*, by justice Manwoode, in the case of Clere and Brooke [s]; from whence it is adopted by Lord Bacon [t], and Sir Matthew Hale [u]: because, it is said, that all the female ancestors on the part of the father are equally worthy of blood; and in that case proximity shall prevail. And yet, notwithstanding these respectable authorities, the compiler of this table hath ventured (in point of theory, for the case never yet occurred in practice) [42] to give the preference to No. 10 before No. 11; for the following reasons: 1. Because this point was not the principal question in the case of Clere and Brooke: but the law concerning it is delivered *obiter* only, and in the course of argument, by Justice Manwoode; though afterwards said to be confirmed by the three other justices in separate, extrajudicial, conferences with the reporter. 2. Because the chief justice, Sir James Dyer, in reporting the resolution of the court in what seems to be the same case [w], takes no notice of this doctrine. 3. Because it appears from Plowdens's report that very many gentlemen of the law were dissatisfied with this position of Justice Manwoode; since the blood of No. 10 was derived to the purchasor through a great number of males than the blood of No. 11, and was therefore, in their opinion, the more worthy of the two. 4. Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inpecting the table; wherein No. 16, which is analogous in the maternal line to No. 10 in the paternal, is

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[s] Plowd. 450. [t] Elem. C. L. [u] H. C. L. 240, 244. [w] Dyer, 314.

(42) For more upon this point, see Watk. Desc. b. 3, s. 3; Osgoode's Remarks on the Law of Descents; 3 Cruise Dig. 384; 2 Hale, Hist. Com. Law, 128, 5thed.; 2 Wooddeson's Lect. 262; and Mr. Christian's note to the above passage in the text. Mr. Cruise states that a case exactly in point arose on the Midland circuit in 1805; and was intended to have been argued in Westminster-hall, but was compromised. Several eminent counsel were consulted, among whom was Serjeant Williams; and they were all of opinion that Sir W. Blackstone's doctrine was wrong. (3 Cru. Dig. 2nd ed. 411, n.). The point has since arisen, and has been decided in favour of the learned Commentator's opinion. (*Davies* v. *Lowndes*, 7 Scott, 22, 56). And the legislature has adopted the same rule. (Infra, p. 240, n. (43)).

preferred to No. 18, which is analogous to No. 11, upon the authority of the eighth rule laid down by Hale himself: and it destroys also that constant preference of the male stocks in the law of inheritance, for which an additional reason is before[x] given, besides the mere dignity of blood. 5. Because it introduces all that uncertainty and contradiction, which is pointed out by an ingenious author[y]; and establishes a collateral doctrine (*viz.* the preference of No. 11 to No. 10.) seemingly, though perhaps not strictly, incompatible with the principal point resolved in the case of Clere and Brooke, *viz.* the preference of No. 11 to No. 14. And, though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty; it is apprehended, that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet resolved at all. 6. Because the reason that is given for this doctrine by Lord Bacon, (*viz.* that in any degree, paramount the first, the law respecteth proximity, and not dignity of blood), is directly contrary to many instances given by Plowden and Hale, and every other writer on the law of descents. 7. Because this position seems to contradict the allowed doctrine of Sir Edward Coke[z]; who lays it down (under different names) that the blood of the Kempes (*alias* Sandies) shall not inherit till the blood of the Stiles's (*alias* Fairfields) fail. Now the blood of the Stiles's does certainly not fail, till both No. 9 and No. 10 are extinct. Wherefore No. 11 (being the blood of the Kempes) ought not to inherit till then. 8. Because in the case, Mich. 12 Edw. IV. 14[a], (much relied on in that of Clere and Brooke), it is laid down as a rule, that "*cestuy que doit inheriter al pere, doit inheriter al fits*[b]." And so Sir Matthew Hale[c] says, "that though the law excludes the
[240] father from inheriting, yet it substitutes and directs the descent, as it should have been, had the father inherited." Now it is settled, by the resolution in Clere and Brooke, that No. 10 should have inherited before No. 11 to Geoffrey Stiles, the father, had he been the person last seised; and

[x] Pages 235, 236, 237.

[y] Law of Inheritances, 2nd edit. pp. 30, 38, 61, 62, 66.

[z] Co. Litt. 12. Hawk. Abr. in loc.

[a] Fitzh. Abr. tit. *Discent*, 2. Bro. Abr. tit. *Discent*, 3.

[b] See page 223.

[c] Hist. C. L. 243.

therefore No. 10 ought also to be preferred in inheriting to *John Stiles*, the son.

In case *John Stiles* was not himself the purchasor, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference; that the blood of that line of ancestors, from which it did not descend, can never inherit: as was formerly fully explained [d]. And the like rule, as is there exemplified, will hold upon descents from any other ancestors.

The student should also bear in mind, that, during this whole process, *John Stiles* is the person supposed to have been last actually seised of the estate. For if ever it comes to vest in any other person, as heir to *John Stiles*, a new order of succession must be observed upon the death of such heir; since he, by his own seisin, now becomes himself an ancestor or *stipes*, and must be put in the place of *John Stiles*. The figures therefore denote the order in which the several classes would succeed to *John Stiles*, and not to each other: and before we search for an heir in any of the higher figures, (as No. 8), we must be first assured that all the lower classes (from No. 1 to No. 7) were extinct, at *John Stiles's* decease [43].

[d] See page 236.

(43) The law of descent has been materially altered by the stat. 3 & 4 Will. 4, c. 106, which applies to all descents happening, and to all limitations contained in assurances made, or in wills of persons dying, after the 31st Dec. 1833, and to every kind of property, and every estate and right descendible to heirs, whether according to the common law of England, or by the custom of gavelkind, or Borough-English, or any other custom, (ss. 1, 11, 22), the alterations being in fact of such rules of law only as were equally applicable to common-law and to customary descents.

Adopting the method of Blackstone, the canons of descent, according to the new law, may be thus stated.

1. *The descent shall be traced from the last purchaser, or the last person entitled to the land who cannot be proved to have inherited it.*

Descent subsequent to 1833. (3 & 4 Will. 4, c. 106).

The words are, "That in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner, the last person from whom the land shall be proved to have been inherited shall in

every case be considered to have been the purchaser, unless it shall be proved that he inherited the same." (Sect. 2).

In the interpretation clause with which the act commences, the word "purchaser" is defined to mean "the person who last acquired the land otherwise than by descent, or than by any *escheat*, *partition*, or *inclosure* by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent."

And the same clause defines the person last entitled to be "the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof."

Thus, the effect of seisin in making an heir the stock of descent is entirely abolished. But the hardship which that rule occasionally gave rise to may frequently (and especially in cases governed by the custom of gavelkind) be replaced by another, which does not seem to have been foreseen by the legislature. The inconvenience alluded to may be thus illustrated: suppose John Stiles to purchase an estate, and to die leaving three daughters, Anne, Jane, and Mary, his only issue. They will take each one third. Then, suppose Anne to die, without having disposed of her share, and leaving a son, James. Here the question is, who is to inherit the one-third, to which Anne was entitled? Under the old law, if Anne had died seised, her son would have taken the whole, and this would accord with our common notions of justice and convenience. But now the descent is to be traced from the last purchaser, that is to say, the person or persons to inherit is the heir or heirs of the last purchaser, who, in the case supposed, are Jane, Mary, and James, the representative of Anne; so that James, instead of inheriting his mother's estate, only gets one-third of it, or one-ninth of the original estate purchased by his grandfather. If James were now to die in the lifetime of his aunts, leaving a son, such son would take one twenty-seventh only of the original estate; and by other events which might easily happen, the estate would become divided in a very intricate manner.

Another inconvenience which the new law may give occasion to, though, on account of the frequent settlements and sales of estates, it is not so likely to occur as the former, is the length of the pedigree required to establish an heirship, where an estate has descended through several generations, and the uncertainty which must exist as to the true heir, whenever the original purchaser cannot be ascertained. The Real Property Commissioners, upon whose First Report this act was mainly founded, recommended that the descent should be traced from the person last entitled, whether his title arose by purchase or descent, and whether he had acquired a seisin or not; and it is to be regretted that this rule was not adopted.

2. *That inheritances shall lineally descend to the issue of the last purchaser.*

3. *That on failure of issue of the last purchaser, the inheritance shall go to his nearest lineal ancestor, or his issue; the ancestor taking in preference to his issue, but so that a nearer lineal ancestor and his issue are to be preferred to a more remote lineal ancestor and his issue other than such nearer lineal ancestor or his issue.*

The words are, "That every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir, in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descend-

ant of such lineal ancestor; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor, or his issue." (Sect. 6).

4. *That a relation of the whole blood, and his or her issue, shall be preferred to a relation of the same degree of the half blood, and his or her issue.*

The words are, "That any person related to the person from whom the descent is to be traced, by the half blood, shall be capable of being his heir, and the place in which any such relation by the half blood shall stand in the order of inheritance, shall be next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male; and next after the common ancestor, where such common ancestor shall be a female; so that the brother of the half blood, on the part of the father, shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood, on the part of the mother, shall inherit next after the mother." (Sect. 9).

This clause is rendered obscure by an attempt at explanation or precision that would have been quite superfluous had the clause preceded instead of following the 7th and 8th sections, which place the collateral relations next after the male ancestor from whom they derive that relationship, and also provide, that the female ancestors are not to be resorted to until the male line is exhausted. By the 6th section, such female ancestor is to take in preference to her issue; from which it follows, that (as all the descendants of a female ancestor, who are of the whole blood to the purchaser, are also descendants of the male ancestor, and must therefore have been already exhausted before the female ancestor is resorted to) her descendants of the half blood, being the only collateral relations left, must take *immediately* after her. In other words, the collateral relations of the half blood take *after* the common ancestor, whether male or female, by virtue of the express enactment in the 6th section; they take also after the collateral relations in the same degree of the whole blood by the enactment in the 9th section; and because before the female ancestor can be resorted to there must be a failure of collateral relations of the whole blood, they take *immediately* after her. See the annexed table, numbers 15 and 20; 28 and 33; 12 and 25; 8, 9, and 38, 39; 42 and 55; 45 and 50; and 58 and 63.

5. *Each male ancestor and his ancestors, whether male or female, and his and their issue, shall be preferred to all other female ancestors and their ancestors, whether male or female, and their issue.*

The words are, "That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting, until all his paternal ancestors and their descendants shall have failed; and also, that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed." (Sect. 7).

"That where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male pa-

ternal ancestor or her descendants; and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor, and her descendants." (Sect. 8).

6. *That the male issue shall be admitted before the female.*

7. *That when there are two or more males in equal degree, the eldest only shall inherit; but the females altogether.*

8. *That (subject to the third rule) a parent shall be preferred to his issue; but the issue in infinitum of any person deceased shall represent their ancestor; that is, shall stand in the same place as he would have done had he been living.*

Under the old law, the heir must have been of the blood of the last purchaser; and under the new law, the person to take by descent is to be the heir of the last purchaser; but there always have been means (the list of which has been augmented by the recent statute) by which a person taking property by descent may acquire a new estate therein by purchase, and thus, *breaking the descent*, as it was termed, make himself for all purposes the original root of descent. Thus, formerly, if a person taking an estate by descent from his mother did certain acts, and died without issue, his heir would have been sought among his paternal collateral relations; and now, if a parcener does certain acts, her son may inherit to the whole of her share; or, generally, if an heir does any of the acts referred to, or even acquires his estate originally in a certain manner, he makes himself the purchaser or person from whom the descent is to be traced.

Before the recent statute, in order to break the descent in this manner, the heir must have lost his old estate, and acquired a new estate in the land; and if he merely conveyed away the whole fee, and limited back an estate to himself and his heirs, or to his heirs alone in fee-simple, either at common law, or by way of use, the descent was not changed; for so much as was limited back was the old reversion, and a man could not purchase of himself; à fortiori, if he simply disposed of a particular estate, leaving the reversion in himself. (Co. Litt. 22. b.; 3 Lev. 406; 1 B. & Cr. 448; 2 P. Wms. 135). But if he once allowed the legal inheritance to vest in another, though but for a single minute (unless as a mere releasee to uses), and subsequently acquired the estate by re-conveyance, it was otherwise. (Co. Litt. 12. b.; 7 T. R. 103). If rent was reserved upon a conveyance in fee, this was no part of the reversion, and descended as an estate by purchase; but when a reversion in the land was also reserved, the rent followed the reversion. (Co. Litt. 12. b.) If land inherited ex parte maternâ was conveyed in fee, with a condition that the grantor or his heirs might enter in certain events, this condition was said to descend to the heir ex parte paternâ, who alone could take advantage of it; but if he entered, it was for the benefit of the heir ex parte maternâ, who might enter upon him. (9 H. 7, 24 b; Co. Litt. 12. b.; Plowd. 57). And this doctrine (though questioned by Mr. Preston, 2 Abstr. 427) seems to be well established. In the same manner, upon a feoffment in fee of gavelkind land with a condition, the heir at common law alone could re-enter, but for the benefit of his co-parceners. (Moor, 113). So, in the case put by Lord Coke of a feoffment on condition by the husband of tenant in fee. (1st Inst. 202 a). But where the condi-

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AT THE

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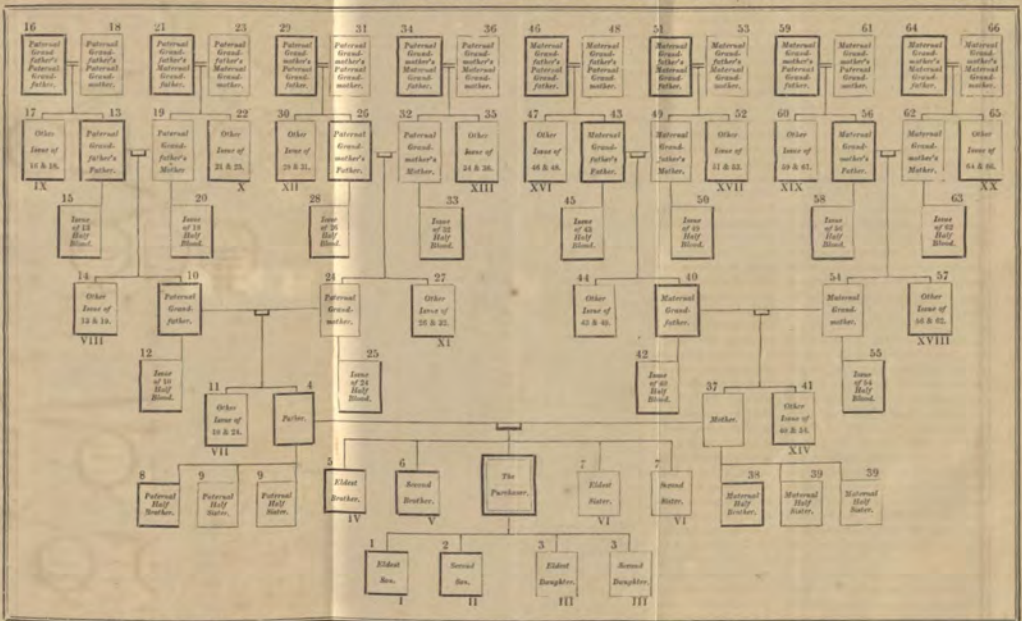
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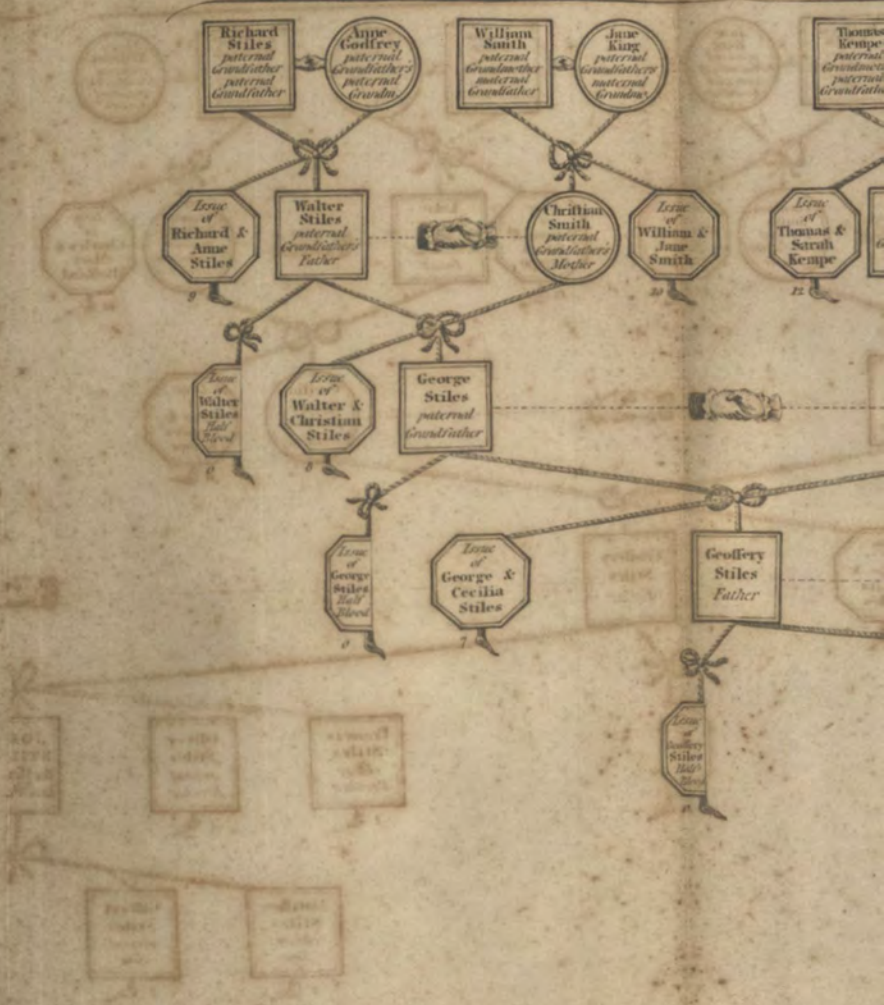
38 Maternal Half Brother.
39 Maternal Half Sister.
39 Maternal Half Sister.
1 Eldest Son. I
2 Second Son. II
3 Eldest Daughter. III
3 Second Daughter. III

The Order of Descent at the Common Law is indicated by Numerals, that subsequent to the year 1833 by Arabic figures.

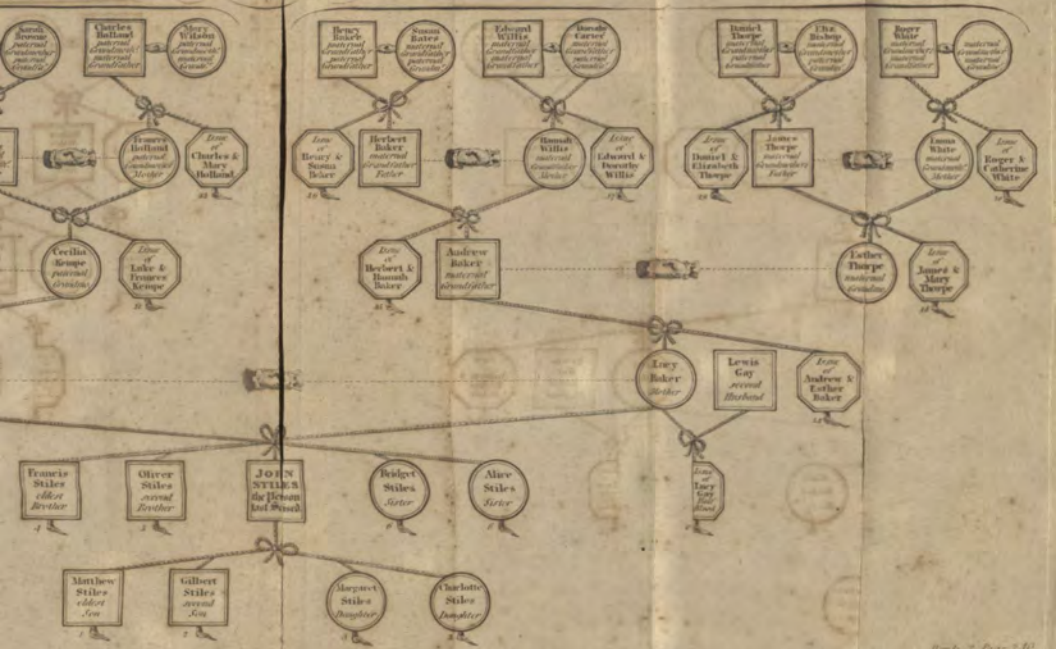
Paternal Line



(This Table exhibits the course of Descent prior to the year 1834.)

Table of Descents.

Maternal Line.


Sarah Breese maternal Grandmother paternal Grandfather
Charles Holland maternal Grandfather paternal Grandfather
Mary Wilson maternal Grandmother paternal Grandfather
Frances Holland paternal Grandmother Mother
Issue of Charles & Mary Holland
Cecilia Kemper paternal Grandchild
Issue of Luke & Frances Kemper
Betsy Baker paternal Grandfather paternal Grandfather
Susan Baker maternal Grandfather paternal Grandfather
Edward Willis maternal Grandfather paternal Grandfather
Dorothy Carter maternal Grandfather paternal Grandfather
Issue of Henry & Susan Baker
Herbert Baker maternal Grandfather Father
Hannah Willis maternal Grandfather Mother
Issue of Edward & Dorothy Willis
Issue of Herbert & Hannah Baker
Andrew Baker maternal Grandfather
Daniel Thorpe paternal Grandfather paternal Grandfather
Eliz. Bishop maternal Grandmother paternal Grandfather
Issue of Daniel & Elizabeth Thorpe
James Thorpe maternal Grandfather Father
Henry White maternal Grandfather paternal Grandfather
maternal Grandmother paternal Grandfather
Emma White maternal Grandmother Mother
Issue of Roger & Catherine White
Esther Thorpe maternal Grandma
Issue of James & Mary Thorpe
Lucy Baker Mother
Lewis Gay second Husband
Issue of Andrew & Esther Baker
Issue of Lucy Gay first Husband
Francis Stiles eldest Brother
Oliver Stiles second Brother
JOHN STILES the Person 2nd Named
Bridget Stiles Sister
Alice Stiles Sister
Matthew Stiles eldest Son
Gilbert Stiles second Son
Margaret Stiles Daughter
Charlotte Stiles Daughter

tion is incident to a reversion, of course the benefit of it descends with the reversion to the heir ex parte maternâ. (Moor, 113; Godb. 2; Co. Litt. 215. a.). The descent was not changed by a partition between co-parceners, though effected by a conveyance to uses; and even a rent granted for equality of partition descended as if it were annexed to the deficient share in the land. (Co. Litt. 169. b., 177. b.; Com. Dig., *Parceners*, (C. 15); 1 Nev. & P. 255). If only the equitable interest descended ex parte maternâ, and the legal estate was subsequently purchased, the entire descent was changed. (2 Doug. 771; 1 Sim. & St. 55).

If the ancestor devised the estate in fee to his heir, either by name or by description as heir, the descent was not changed, even in the case of copyholds which passed by surrender made in the ancestor's lifetime, and the creation of particular estates or incumbrances, or even of an executory limitation in fee, made no difference. (Lord Raym. 728, 829; 2 W. Bl. 687; 13 Ves. 412; 1 B. & Al. 530; 2 Myl. & K. 93). But the descent was changed by a devise to the heir jointly with another, or of lands descendible at common law to the heir by the custom of gavelkind, or of the entirety to one of several co-heirs, (Plowd. 545 b; 2 Vern. 732; Harg. Co. Litt. 24. b.; 3 Bos. & P. 643), or of an estate descendible ex parte maternâ to the collateral heir ex parte paternâ, the devisee in all of these cases not being the heir, in respect of the estate in question. But a devise to the heir and another, as tenants in common, being the same thing as a devise of a moiety to the stranger, did not give the heir his moiety by purchase; although, if the heir could not take under the devise in the same way as he would have taken by descent, it was a purchase; as, where an estate in gavelkind was given to the testator's sons, either with or without words of division,—since by the devise they could not take as parceners, but in the one case in common, and in the other jointly. (Goldsb. 88; 1 Sim. 112).

Under the recent statute, however, a devise to an heir, or a limitation in a deed to the grantor or to his heirs, will in all cases confer an estate by purchase on the person taking under such devise or limitation, (sect. 3). (10 Sim. 374). But if the grantor takes the fee as a resulting use, and not by virtue of an express limitation, the statute does not interfere, and the descent is not changed.

If land is limited to A. for an estate of freehold, and in the same assurance is contained a limitation to the heir at law, or in tail, of A., this gives an estate of inheritance to A., under the rule in Shelley's case, (infra, p. 242); but formerly, where there was a limitation to the heirs at law of A., and no estate of freehold was given to A., the person sustaining the character of A.'s heir at the time appointed for the vesting of the estate, took by purchase; so that in the case of a limitation in fee-simple the estate descended to the heirs ex parte paternâ of such purchaser, although A. were a woman. But in the case of a limitation to the heirs special of A., the land descended in a kind of quasi entail to his heirs and issue generally, and not to the heirs and issue of the purchaser. (Co. Litt. 13. a.; Fearne, 82).

Where the land was of gavelkind tenure, the heir at common law took in the first instance by purchase. (Br. Ab., *Descent*, 59; Co. Litt. 10. a.; 1 Rep. 101). Even a limitation to A. and his heirs on the part of his mother merely gave him a fee conditional on the existence of such an heir. (Co. Litt. 220).

But now, in such cases, the land is directed to descend, and the descent thereof to be traced, as if the ancestor named in such limitation had been the purchaser of such land. (Sect. 4).

CHAPTER XV.

OF TITLE BY PURCHASE, AND FIRST BY ESCHEAT.

Purchase defined.

PURCHASE, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton[a]: the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person not by his own act or agreement, but by the single operation of law[b] [1].

Purchaser is he who comes to the estate by his own agreement.

Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale, for money or some other valuable consideration. But this falls far short of the legal idea of purchase: for, if I *give* land freely to another, he is in the eye of the law a purchasor[c]; and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift [2]. A man who has his father's estate settled upon him in tail, before he was born, is also a purchasor; for he takes quite another estate than the law of descents would have given him. Nay even if the ancestor devises his estate to his heir at law by will, with other limitations, or in any other shape than the course of descents would direct, such heir shall take by purchase[d].

[a] § 12. [b] Co. Litt. 18. [c] Ibid. [d] Lord Raym. 728.

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(1) See the division of the modes of acquiring a title into title by descent and purchase, ante, pp. 200, 201; 2 Wooddes. V. L. 250—265).

(2) In Plowd. 11, Saunders, arguendo, says, that a man may have land not by descent, that is, by purchase, in three ways, by bargain or gift for money, by gift without any recompence, and by way of remainder. The title of a devisee of freeholds, or of an executor or administrator to leaseholds, or of an assignee in bankruptcy or insolvency, comes under the description of a title by purchase, since, in none of these

But if a man, seised in fee, devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it, he shall be adjudged to take by descent [e], even though it be charged with incumbrances [f]; this being for the benefit of creditors, and others, who have demands on the estate of the ancestor [3]. If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but if he dies during the continuance of the particular estate, his heirs shall take as purchasors [g]. But if an estate be made to A. for life, remainder to his right heirs in fee, his heirs shall take by descent: for it is an antient rule of law, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by *purchase*, but only by *descent* [h]. And, if A. dies before entry, still his heir shall take by descent, and not by purchase; for, where the heir takes any thing that might have vested in the ancestor, he takes by way of descent [i]. The ancestor, during his life, beareth in himself all his heirs [k]; and therefore when once he is or might have been seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself, and the word "heirs" in this case is not esteemed a word of *purchase*, but a word of *limitation*, enuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple [4]. And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchasor originally nominated in the deed, as must have been the case if the remainder had been expressly limited to Matthew or Thomas

[242]

Rule in Shelley's case.

[e] 1 Roll. Abr. 626.
[f] Salk. 241. Lord Raym. 728.
[g] 1 Roll. Abr. 627.
[h] 1 Rep. 104. 2 Lev. 60. Raym. 334.
[i] Shelley's case, 1 Rep. 98.
[k] Co. Litt. 22.

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cases, can the title arise without the consent, and to some extent the act, of the party.

(3) This reason for the rule had for some time ceased to exist before the rule itself was abolished. (Vide ante, p. 240, n. (43)). As to the claims of creditors on real estate, vide infra, p. 511, n. The true ground of the preference at common law of a descent to a devise or purchase was, that the former brought more profitable fruits of tenure to the lord.

(4) This is the celebrated rule in Shelley's case. (1 Co. 88. See Harg. Co. Litt. 376. b., n. 1; Fearne, C. R. 28; Preston on Estates, 1 vol. 263 to 419; ante, p. 172, n. (14)).

by name; then, in the times of strict feodal tenure, the lord would have been defrauded by such a limitation of the fruits of his signiory, arising from a descent to the heir.

"Conquest" of the feudists.

What we call *purchase, perquisitio,* the feudists called *conquest, conquaestus,* or *conquisitio* [l]: both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland [m]: as it was among the Norman jurists, who stiled the first purchasor (that is, he who brought the estate into the family which at present owns it) the conqueror or *conquereur* [n]. Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times, entitled *conquaestus,* and himself *conquaestor* or *conquisitor* [o]; signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived: though now, from our disuse of the feodal sense of the word, together with the reflection on his forcible method of acquisition, we are apt to annex the idea of *victory* to this name of *conquest* or *conquisition:* a title which, however just with regard to the *crown,* the conqueror never pretended with regard to the *realm* of England; nor, in fact, ever had [p].

[243]

Differences in effect between taking by descent and purchase.

The difference in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase, he takes it not *ut feudum paternum* or *maternum,* which would descend only to the heirs by the father's or the mother's side: but he takes it *ut feudum antiquum,* as a feud of indefinite antiquity; whereby it becomes inheritable to his heirs general, first of the paternal, and then of the maternal line. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent

[l] Craig, l. 1, t. 10, § 18.
[m] Dalrymple of Feuds, 210.
[n] Gr. Coustum. Gloss. c. 25, pag. 40.
[o] Spelm. Gloss. 145.
[p] See Book I. ch. 3.

will[5]. For, if the ancestor, by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he (or any other in trust for him[q]) had any estate of inheritance vested in him by descent from (or any estate *pur auter vie* coming to him by special occupancy, as heir to[r]) that ancestor, sufficient to answer the charge[s]; whether he remains in possession, or hath aliened it before action brought[t]; which sufficient [244] estate is in the law called *assets;* from the French word *assez*, enough[u]. Therefore, if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets*, by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent[v].

Five modes of acquiring title by purchase.

This is the legal signification of the word *perquisitio*, or purchase; and in this sense it includes the five following methods of acquiring a title to estates: 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. Of all these in their order.

I. Escheat.

I. Escheat, we may remember[w], was one of the fruits and consequences of feodal tenure. The word itself is originally French or Norman[x], in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee[y].

[q] Stat. 29 Car. II. c. 3, § 10.
[r] Ibid. § 12.
[s] 1 P. Wms. 777.
[t] Stat. 3 & 4 W. & M. c. 14.
[u] Finch, Law, 119.
[v] Finch, Rep. 86.
[w] See page 72.
[x] *Eschet*, or *échet*, formed from the verb *eschoir* or *échoir*, to happen.
[y] 1 Feud. 86. Co. Litt. 13.

(5) And though, under the new law of inheritance, an estate limited to the heirs of A. will vest in A.'s heir, and descend from him as if he had actually inherited it from A., (ante, p. 240, n.); yet, if A. took no estate of freehold under the same assurance, his heir, though he takes because he is heir, is a purchaser, and is not answerable for A.'s debts.

Escheat therefore, being a title frequently vested in the lord by inheritance, as being the fruit of a signiory, to which he was entitled by descent, (for which reason the lands escheating shall attend the signiory, and be inheritable by such only of his heirs as are capable of inheriting the other[z]), it may seem in such cases to fall more properly under the former general head of acquiring title to estates, *viz.* by descent, (being vested in him by act of law, and not by his own act or agreement), than under the present by purchase. But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or suing out a *writ of escheat*[a 6]: on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred[b]. It is, therefore, in some respect a title acquired by his own act, as well as by act of law. Indeed, this may also be said of descents themselves, in which an entry or other seisin is required, in order to make a complete title; and therefore this distribution of titles by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: for, as escheats must follow the nature of the signiory to which they belong, they may vest by either purchase or descent, according as the signiory is vested. And, though Sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant[c], and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus haeres*, and therefore taking by descent in a kind of caducary succession[7].

[245]

Requisites to a complete title by escheat.

The law of escheats is founded upon this single principle,

[z] Co. Litt. 13.

[a] Bro. Abr. tit. *Escheat*, 26.

[b] Bro. Abr. tit. *Acceptance*, 25. Co. Litt. 268.

[c] 1 Inst. 215.

(6) The writ of escheat has been abolished, (stat. 3 & 4 Will. 4, c. 27, s. 36), and the lord's remedy is by entry or ejectment, or, in the case of the crown, by a commission of escheat. (12 East, 96).

(7) Blackstone was certainly in error when he treated of escheat under the division of title by purchase. On this subject, the learned annotator on The First Institute remarks, that " an escheat in appearance participates of the

that the blood of the person last seised in fee-simple is, by some means or other, utterly extinct and gone: and, since

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nature both of a purchase and a descent; of the former, because some act by the lord is requisite to perfect his title, and the actual possession of the land cannot be gained till he enters or brings his writ of escheat [now abolished]; of the latter, because it follows the nature of the seignory, and is inheritable by the same persons. But strictly speaking, an escheat is a title neither by purchase nor descent. It should be considered, that though the lord must do some act to put himself into the actual possession, yet his *title* to take possession commences immediately on the want of a tenant, and this title is vested in him without waiting for his own deed or agreement, and as much by mere act of law as the title of an heir is in the case of a descent; [so that though one to whom land is limited by way of purchase, may before acceptance *disclaim* the estate, and thus bar his heir from claiming it, a lord entitled to an escheat cannot, any more than an ordinary heir, disclaim the title so as to prevent his heir from afterwards asserting it], and therefore both titles are equally excluded from being purchases. On the other hand escheat is not a title by descent, for the lord takes it in his capacity of *lord* of the seignory, of which the land escheated was holden, and not as *heir* or by right of blood. Nor is it any objection to this way of considering the title by escheat, that the land escheated will be inheritable in the lord as land by purchase, where he has the seignory by purchase, and as land by descent, where he has the seignory by descent; for the reason of this is, not that the escheat is either a purchase or descent, but because the escheat follows the seignory from which the right to it is derived, as an accessory its principal. According to this view of the subject, instead of distributing all the several titles to land under *purchase* and *descent*, it would be more accurate to say that the title to land is either by *purchase*, to which the act or agreement of the party is essential, or by *mere act of law*, and under the latter to consider first descent, and then escheat and such other titles, not being by descent, as yet, like them, accrue by mere act of law." (Harg. Co. Litt. 18. b. n. 2). It is singular that this acute writer should thus have confounded the origin of the lord's title to escheat, with the occasion upon which it becomes exerciseable. The title to enter upon an escheat is part of the old seignory or reversion, (Bracton, describing an escheat, says, "*revertitur terra*," lib. 2, f. 23); it is that part of his old estate, which, prior to the statute against subinfeudations, the lord was allowed to retain to himself, just as the reversion, which is left in the donor or lessor after a gift in tail, or a lease for life, is part of his old estate. When the subordinate estate, whether fee-simple, fee-tail, or mere life estate, is exhausted, then the seignory or reversion falls into possession, and the lord or reversioner enters, not by virtue of any title just accrued to him, but because the event has happened upon which his old title was to be exercised. If the reversion or seignory was his by purchase, his title remains, after the escheat as before, a title by purchase; if he took his reversion or seignory by descent, then it is still a title by descent. To speak of acquiring a title by escheat, is as incorrect as it would be to speak of acquiring a title by death of tenant for life, or by failure of issue in tail; it is to confound the original title, which first connects the person with the land, with the right of entry. An heir may take a remainder by descent, and when the particular estate fails, he enters, but still his title is by descent.

Incumbrances on the seignory bind the lands which accrue to the lord by escheat. (See 7 Rep. 6; 1 Roll. 402; 1 Eden, 192).

none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feodal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis:* the one sort, if the tenant dies without heirs; the other, if his blood be attainted [d]. But both these species may well be
[246] comprehended under the first denomination only; for he that is attainted suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires in the other; or, as the doctrine of escheats is very fully expressed in Fleta [e], "*dominus capitalis feodi loco haeredis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis* [8]."

[d] Co. Litt. 13, 92. [e] L. 6, c. 1.

(8) "An escheat was in its nature feodal. A feud was the right which the tenant had to enjoy lands, &c., rendering to the lord the duties and services reserved to him by contract. On the other hand, a right remained in the lord after a grant made, called a 'seignory;' consisting of services to be performed by the tenant, and a right to have the land returned on the expiration of the grant as a reversion; a right afterwards called an 'escheat.' And as the grant was more or less extensive, the reversion was more or less remote, for the feuds were sometimes temporary, sometimes hereditary; and a temporary one ended on the grantee's death. Sir H. Spelman takes notice only of hereditary feuds, nor do our own laws. And though it may seem a paradox to modern ears, a feoffment to A. and his heirs did not pass a fee-simple originally in the sense we now use it, but only an estate to be enjoyed as a merum beneficium, without the power of alienation in prejudice of the heir or the lord. And the heirs took it successively as a usufructuary interest, and in default of heirs the land escheated, or *reverted*, strictly speaking. If there was an heir, and by legal impediment he could not take, the land escheated. (Bract. fo. 23 a; 46 Ed. 3, pl. 4; Br. Ab., *Escheat*, pl. 2)."

"In short the *reverter* took place where the grant expired naturally, and the heir failed in length of time. In case of *escheat* it was cut off by civil-law impediment, and was an accidental determination of it. The heir took by purchase and independent of the ancestor; he could not alien, nor could the lord alien the seignory without the consent of the tenant. Afterwards the right of the lord gradually underwent several variations, which tended to diminish the interest of the heir and the lord, and to increase that of the tenant. So is Spelm. c. 1." Per Sir T. Clarke, M. R., 1 Eden, 191. The distinction drawn by Sir T. Clarke between *reverter* and *escheat* has been long disregarded, at least in the use of the latter word.

As escheat only arises on account of the want of a tenant,—if lands be vested

Escheats, therefore, arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

Modes of failure of hereditary blood.

1, 2, 3. The first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors; secondly, when he dies without any relations on the part of those ancestors from whom his estate descended[9]; thirdly, when he dies without any relations of the whole blood. In two of these cases the blood of the first purchasor is certainly, in the other it is probably, at an end; and, therefore, in all of them, the law directs, that the land shall escheat to the lord of the fee; for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any person should be suffered to succeed to the lands, who is not of the blood of the first feudatory, to whom, for his personal merit, the estate is supposed to have been granted[10].

Monsters.

4. A monster, which hath not the shape of mankind, but

(9) *Doe* v. *Blackburn*, 1 M. & Rob. 547.

in A., in trust for B. and his heirs, and B. dies without heirs, there is no escheat, and the best authorities seem to be in favour of the trustee's right to retain the land for his own benefit. In the great case of *Burgess* v. *Wheate*, the Lord Keeper determined, with the concurrence of Sir Thomas Clarke, Master of the Rolls, but contrary to the opinion of Lord Mansfield, whose assistance he had requested, that where a *cestuy que trust* dies without heirs, the trust does not escheat to the crown, but that the trustee shall hold them for his own benefit. (1 W. Bl. 123; 1 Eden, 177; 2 Ves. jun. 170. See 2 Roll. Ab. 65; 1 Sid. 403, 465, 488; 3 Wils. 13; 2 Ves. sen. 301; 3 Ves. 752). In a modern case Sir J. Leach, V. C., seems to have overlooked these authorities. (2 Sim. & St. 498).

(10) If the original tenant has in his lifetime aliened the fee-simple, of course there is no escheat, a new stock of inheritance having been substituted; and even a devise by the tenant, as it would have defeated his heir, if he had left one, so it will defeat the lord's claim by escheat; but a mere power to sell, without an estate, it seems, is void against the lord. (Co. Litt. 235. b., n.; 2 Atk. 223). And any particular estate of freehold, or for years, created by the tenant during his life, or by will, is binding on the lord after a failure of heirs. And it has been decided even, that the mere equitable claim, which, by statute, creditors now have to be satisfied out of the real estate of

in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although
[247] it hath deformity in any part of its body, yet, if it hath human shape, it may be heir[f]. This is a very antient rule in the law of England[g]; and its reason is too obvious, and too shocking, to bear a minute discussion. The Roman law agrees with our own in excluding such births from successions[h], yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby[i]; (as the *jus trium liberorum*, and the like); esteeming them the misfortune, rather than the fault, of that parent. But our law will not admit a birth of this kind to be such an issue, as shall entitle the husband to be tenant by the curtesy[k]; because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

Bastards.

5. Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination[l]. Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur*[m]. Being thus the

[f] Co. Litt. 7. 8.

[g] *Qui contra formam humani generis converso more procreantur, veluti si mulier monstruosum vel prodigiosum enixa sit, inter liberos non computentur. Partus autem qui membrorum officia ampliavit, ut si sex digitos habeat, vel si quatuor tantum, vel si tantum unum, talis inter liberos connumerabitur.* Bract. l. 1, c. 6. § 7. *Sed non dico partum monstruosum licet natura membra minuerit vel ampliaverit; minuerit, ut in defectu digitorum, vel hujus modi; ampliaverit, ut si plures digitos vel articulos, sicut sex vel plures ubi non debet habere nisi quinque; si inutilia natura reddiderit membra, ut si curvus fuerit, vel gibbosus, vel membra tortuosa haberit.* Ibid. l. v. tr. 5, c. 30, § 10.

[h] Ff. 1. 5. 14.

[i] Ff. 50. 16. 135. Paul. 4, sent. 9, § 63.

[k] Co. Litt. 29.

[l] See Book I. ch. 16.

[m] Co. Litt. 8.

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their deceased debtor, is to be preferred to a title by escheat. (*Evans* v. *Brown*, 6 Jurist, 380). But this decision was founded upon particular acts of Parliament. Formerly, if the legal estate vested in a trustee escheated, the lord took it discharged from the trust, (1 Eden, 203; 2 Myl. & K. 343; Harg. Co. Litt. 13. a.); but this injustice has been remedied by a modern statute, (4 & 5 Will. 4, c. 23), which applies to all escheats and forfeitures of real and personal property, held either wholly or partially in trust for other persons. (And see 11 Geo. 4 & 1 Will. 4, c. 60; 1 & 2 Vict. c. 69).

sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchasor: and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord[n]. The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father[o]: and also, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance[p]: and a bastard was likewise capable of succeeding [248] to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not[q]. But our law, in favour of marriage, is much less indulgent to bastards[11].

Case of bastard eignè and mulier puisnè.

There is, indeed, one instance, in which our law has shewn them some little regard; and that is usually termed the case of *bastard eignè* and *mulier puisnè*. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who, in the language of the law, is called a *mulier*, or as Glanvil[r] expresses it in his Latin *filius mulieratus*; the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eignè*; and the younger son is legitimate, or *mulier puisnè*. If then the father dies, and the *bastard eignè* enters upon his land, and enjoys it to his

[n] Finch, Law, 117. [o] Nov. 89, c. 8. [p] Ibid. c. 12.
[q] Cod. 6, 57, 5. [r] L. 7, c. 1.

(11) The law of Scotland allows a person born out of lawful wedlock to be legitimate if his parents subsequently intermarry, without any marriage of either with a third person intervening. (7 Cl. & Fin. 817, 842). But although the status as to legitimacy of a person is for most purposes determined by the law of the domicile of his parents, yet for the purpose of inheriting land in England, a bastard, so legitimated by the law of Scotland, is not allowed by the English law to be legitimate. (*Doe* d. *Birtwhistle* v. *Vardell*, 5 B. & Cr. 438; 2 Scott, N. R. 821; 9 Bligh, 32; 7 Cl. & Fin. 859). Legitimacy, according to the law of the domicile, as well as according to the law of the place where the land lies, is necessary to entitle an heir. For a child born out of wedlock, of parents domiciled in England, who afterwards married there, was not allowed to inherit lands in Scotland. (6 Bligh, 468. See 2 Ves. & B. 127).

As to the status of bastards during the middle ages, and on the continent, see Butl. Co. Litt. 243. b.

death, and dies seised thereof[12], whereby the inheritance descends to his issue; in this case the *mulier puisnè* and all other heirs, (though minors, feme-coverts, or under any incapacity whatsoever), are totally barred of their right[s]. And this, 1. As a punishment on the *mulier* for his negligence, in not entering during the *bastard's* life, and evicting him[13]. 2. Because the law will not suffer a man to be bastardized after his death, who entered as heir and died seised, and so passed for legitimate in his lifetime[14]. 3. Because the canon law (following the civil) did allow such *bastard eignè* to be legitimate on the subsequent marriage of his mother; and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shewn to no other kind of bastard; for, if the mother was never married to the father, such bastard could have no colourable title at all[t].

[249] As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal an-

[s] Litt. § 399. Co. Litt. 244. [t] Litt. § 400.

(12) There must have been not only a dying seised, but a descent to his *issue*. (Co. Litt. 244. a.). And if the bastard died seised, his wife enseint with a son, the mulier entered, the son was born, the issue of the bastard was barred. (Ibid.; Broke, tit. *Descent*, 41; Plowd. 57 a, 372 a).

The elder *daughter* being illegitimate had the same privilege as a son. "If a man hath issue two daughters, the eldest being a bastard, and they enter and occupy peaceably as heirs, now the law in favour of legitimation shall not adjudge the whole possession in the mulier (who then had the only right), but in both; so as if the bastard hath issue and dieth, her issue shall inherit." (Co. Litt. 244. a.).

(13) But (as is stated in the text) the rule bound even an infant or a younger daughter who was married during the whole term, and therefore excusable in the eye of the law for any negligence. (Co. Litt. 244. a.).

(14) The rule held good only in this one case of *bastard eignè* and *mulier puisnè*. (*Pride* v. *Earls of Bath and Montague*, 1 Salk. 120, 132). So that the second reason given in the text is, according to a favourite practice of the Commentator, nothing more than the thing itself which is to be accounted for stated in different words. The third reason is very much of the same description. The stat. 3 & 4 Will. 4, c. 27, s. 39, which enacts that no descent cast shall defeat any right of entry, seems to have put an end to the privilege of the bastard eignè.

cestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore, if a bastard purchases land, and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee [u].

6. Aliens [v], also, are incapable of taking by descent, or inheriting [w]: for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reasons strictly feodal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introducing our feuds, the defence of the kingdom, would have been defeated [15]. Wherefore, if a man leaves no other relations but aliens, his land shall escheat to the lord [16]. Aliens.

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase [x 17], they are under still greater disabilities. And, as

[u] Bract. l. 2, c. 7. Co. Litt. 244.
[v] See Book I. ch. 10.
[w] Co. Litt. 8.
[x] Ibid. 2.

(15) Spelman says, that the rule is founded on the inconsistency of the tenure of lands by fealty with allegiance to a foreign prince. (Gloss. voce *Ligeantia;* Bac. Ab., *Alien*, (C)). But the grounds of the rule must be of a less technical nature, since it extends to exclude aliens from the benefit even of a trust of land. "That the privileges of aliens born as touching lands are stricti juris, I prove,—first by the politic grounds why an alien is not capable of inheritance in England. They are given in *Calvin's case*, (7 Rep. 27). 1. The secrets of the realm might be thereby discovered. 2. The revenues of the realm (the sinews of war) should be taken and enjoyed by strangers. 3. It tends to the destruction of the realm by admitting strangers to fortify in the heart of the kingdom." (Per Sir O. Bridgman, O. Br. 431).

(16) There is one exception to the general law against aliens, founded on the treaty of 1794, between this country and the United States of America, by the 9th article of which treaty it was stipulated, that British subjects who then held lands in the United States, or American subjects who then held lands in Great Britain, "might grant, sell, or devise the same to those whom they should please, in like manner as if they were natives, and that neither they nor their heirs nor assigns should, so far as might respect the said lands, and the legal remedies thereto, be regarded as aliens;" and this stipulation was confirmed by the stat. 39 Geo. 3, c. 97, s. 24. (See 1 Russ. & M. 663).

(17) If the purchase be made with the king's license, it seems that he may hold. (See 14 Hen. 4, 20; Harg. Co. Litt. 2. b., n. 2). The stat. 13 Geo. 3, c. 14, authorizes mortgages to aliens of lands in the West Indies, under certain conditions which restrain the alien from foreclosing. (See further, p. 293, infra).

they can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit; but so it is expressly holden [y], because they have not in them any inheritable blood.

Denization.

And farther, if an alien be made a denizen by the king's letters patent, and then purchases lands, (which the law allows such a one to do [18]), his son, born before his denization, shall not (by the common law) inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but

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by denization it acquires an hereditary quality, which will be transmitted to his subsequent posterity. Yet if he had been naturalized by act of parliament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not [z 19].

Direct descent between brothers.

Sir Edward Coke [a] also holds, that if an alien cometh into England, and there hath issue two sons, who are thereby natural-born subjects; and one of them purchases land, and dies; yet neither of these brethren can be heir to the other. For the *commune vinculum*, or common stock of their consanguinity, is the father; and as he had no inheritable blood in him, he could communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other.

[y] Co. Litt. 2. 1 Lev. 59. [z] Co. Litt. 129. [a] Ibid. 8.

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(18) The law as to purchases by aliens is shortly this, that the purchase vests the land in the alien, but subject to be divested out of him for the benefit of the crown by the finding of an inquisition in the Exchequer. Letters of denization, so far as they relate to the alien's land, are a mere remission of this forfeiture.

(19) Naturalization confers all the rights of a natural-born subject, except that of filling certain offices, and of taking grants from the crown, &c. (12 & 13 Will. 3, c. 2; 1 Geo. 1, st. 2, c. 4, s. 2). The retrospective effect attributed in the text to an act of naturalization has been considered to extend to entitling an alien wife to dower out of lands held by her husband during the coverture, but sold before her naturalization. (Co. Litt. 31. b., n., 33. a.; 5 Br. P. C. 91; 2 Ves. sen. 286). Much, however, depends upon the words of the act, which sometimes extend only to naturalize the party "from henceforth." (2 Meriv. 431. See 3 Myl. & K. 398).

And this opinion of his seems founded upon solid principles of the antient law; not only from the rule before cited [b], that *cestuy que doit inheriter al pere, doit inheriter al fits;* but also because we have seen that the only feodal foundation, upon which newly purchased land can possibly descend to a brother, is the supposition and fiction of law, that it descended from some one of his ancestors; but in this case, as the immediate ancestor was an alien, from whom it could by no possibility descend, this should destroy the supposition, and impede the descent, and the land should be inherited *ut feudum stricte novum;* that is, by none but the lineal descendants of the purchasing brother; and on failure of them, should escheat to the lord of the fee. But this opinion hath been since overruled [c]: and it is now held for law, that the sons of an alien born here, may inherit to each other; the descent from one brother to another being an *immediate* descent [d]. And reasonably enough upon the whole; for, as (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor as suppose the requisite descent [20].

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Descent through an alien.

It is also enacted, by the statute 11 & 12 W. III. c. 6 [21], that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors, lineal or collateral; although their father, or mother, or other ancestor, by, from, through or under whom they derive their pedigrees, were born out of the king's allegiance [22]. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seised. As, if Francis the elder brother of John Stiles be an alien, and Oliver the younger be a natural-born subject, upon John's death without issue his lands will descend to Oliver the younger brother: now, if afterwards Francis has a child born in England, it was feared that, under the statute of

[b] See pp. 223 and 239. [c] 1 Ventr. 413. 1 Lev. 59. 1 Sid. 193.
[d] See page 226.

(20) Vide ante, p. 226, n. (36).
(21) Extended to Scotland by 16 Geo. 3, c. 52.
(22) See 3 Myl. & K. 402.

king William, this new-born child might defeat the estate of his uncle Oliver. Wherefore it is provided, by the statute 25 Geo. II. c. 39, that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the person last seised:—with an exception however to the case, where lands shall descend to the daughter of an alien; which descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule [d] of descents by the common law.

Attainder.

7. By attainder [23] also, for treason or other felony, the blood of the person attainted is so corrupted [24], as to be rendered no longer inheritable.

Great care must be taken to distinguish between forfeiture of lands to the king, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old
[252] Saxon law [e], as a part of punishment for the offence; and does not at all relate to the feodal system, nor is the consequence of any signiory or lordship paramount [f]: but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which, escheat must un-

[d] See pp. 208 and 214. [e] LL. Aelfred. c. 4. LL. Canut. c. 54.
[f] 2 Inst. 64. Salk. 85.

(23) A person is attainted on whom sentence of death is passed; but the death of a person killed in open rebellion, found and recorded by the Chief Justice of the Queen's Bench, produces the effect of an attainder.

"Dicitur etiam aliquando de criminibus non felonicis, ut, *attinctus perjurii*, vel *mutilationis membrorum alterius;* et frequenter apud vett. pro *convicto.*" (Spelm. Gloss. voce *Attaintus*). So, in the Stat. Gloster, (6 Ed. 1, c. 5), "attainted of waste."

(24) "Various cases are laid down in the Assises de Jérusalem, where the vassal forfeits his land for a year, for his life, or for ever. But under rapacious kings, such as the Norman line in England, absolute forfeitures came to prevail, and a new doctrine was introduced, the corruption of blood, by which the heir was effectually excluded from deducing his title at any distant time through an attainted ancestor." (Hallam, Mid. Ag., vol. 1, p. 127.

doubtedly be reckoned. Escheat therefore operates in subordination to this more antient and superior law of forfeiture.

The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony, (under which denomination all treasons were formerly comprised [g]), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feodal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In this situation the law of feodal escheat was brought into England at the conquest; and in general superadded to the antient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason for ever; in case of other felony, for only a year and a day [25]; after which time it goes to the lord in a regular course of escheat [h], as it would have done to the heir of the felon in case the feodal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands, (which seems to be the old Saxon tenure), that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason [i].

As a consequence of this doctrine of escheat, all lands of [253] inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, till the statute 1 Edw. VI. c. 12, enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the antient law of forfeiture operates; for it is expressly

Dower.

[g] 3 Inst. 15. Stat. 25 Edw. 3, c. 2, § 12. [h] 2 Inst. 36.
[i] Somner, 53. Wright, Ten. 118.

(25) See infra, Vol. 4, p. 386.

provided by the statute 5 & 6 Edw. VI. c. 11, that the wife of one attaint of high treason shall not be endowed at all[26].

Corruption of blood.

Hitherto we have only spoken of estates vested in the offender, at the time of his offence or attainder. And here the law of forfeiture stops; but the law of escheat pursues the matter still farther. For, the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all that he now has shall escheat from him, but also that he shall be incapable of inheriting any thing for the future. This may farther illustrate the distinction between forfeiture and escheat. If therefore a father be seised in fee, and the son commits treason and is attainted, and then the father dies: here the land shall escheat to the lord; because the son, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life; but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit[k]. In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood; here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king for a year and a day, and so long after as the offender lives[l].

There is yet a farther consequence of the corruption and extinction of hereditary blood, which is this: that the per-
[254] son attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor. The channel which conveyed the hereditary blood from his ancestors to him, is not only exhausted for the present, but totally dammed up and rendered impervious for the future. This is a

[k] Co. Litt. 13. [l] 3 Inst. 47.

(26) "Or of any other treasons whatsoever they be," (s. 13); the wife therefore was barred by the attainder of her husband for petit as well as high treason, but not for any murder or other felony. (See Co. Litt. 37. a.; Staundf. 195 b). But the crime of petit treason has since been abolished. (Stat. 9 Geo. 4, c. 31, s. 2).

refinement upon the antient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony [m]. But, by the law of England, a man's blood is so universally corrupted by attainder, that his sons can neither inherit to him nor to any other ancestor [n], at least on the part of their attainted father [27].

This corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender; but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned; but he cannot wipe away the corruption of blood; for therein a third person hath an interest, the lord who claims by escheat. If, therefore, a man hath a son, and is attainted, and afterwards pardoned by the king; this son can never inherit to his father, or father's ancestors; because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so: but if the son had been born after the pardon, he might inherit; because by the pardon the father is made a new man, and may convey new inheritable blood to his after-born children [o].

Herein there is, however, a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law takes no notice: and therefore we have seen, that an alien elder brother shall not impede the [255] descent to a natural-born younger brother. But in attainders it is otherwise: for if a man hath issue a son, and is attainted, and afterwards pardoned, and then hath issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir; neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir; and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though, had the elder died without issue in the life of the

[m] Van Leeuwen in 2 Feud. 31. [n] Co. Litt. 391. [o] Ibid. 392.

(27) The stat. 3 & 4 Will. 4, c. 106, s. 10, allows the descendants of a person attainted to trace their descent through him after his death.

father, the younger son born after the pardon might well have inherited, for he hath no corruption of blood [p]. So, if a man hath issue two sons, and the elder in the lifetime of the father hath issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son: for the issue of the elder, which had once a possibility to inherit, shall impede the descent to the younger, and the land shall escheat to the lord [q]. Sir Edward Coke in this case allows [r], that if the ancestor be attainted, his sons born before the attainder may be heirs to each other; and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable when imparted to them from the father; but he makes a doubt (upon the principles before mentioned, which are now overruled [s]) whether sons, born after the attainder, can inherit to each other, for they never had any inheritable blood in them.

Upon the whole it appears, that a person attainted is neither allowed to retain his former estate, nor to inherit any future one, nor to transmit any inheritance to his issue, either immediately from himself, or mediately through himself from any remoter ancestor; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feodal property, is blotted out, corrupted, and extinguished for ever: the consequence of which is, that estates thus impeded in their descent, result back and escheat to the lord.

[256] This corruption of blood, thus arising from feodal principles, but perhaps extended farther than even those principles will warrant, has been long looked upon as a peculiar hardship: because the oppressive parts of the feodal tenures being now in general abolished, it seems unreasonable to reserve one of their most inequitable consequences; namely, that the children should not only be reduced to present poverty, (which, however severe, is sufficiently justified upon reasons of public policy), but also be laid under future difficulties of inheritance, on account of the guilt of their ancestors. And therefore, in most (if not all) of the new felonies created by parliament since the reign of Henry the Eighth, it is declared, that they shall not extend to any corruption of blood: and by the statute 7 Ann. c. 21, (the

[p] Co. Litt. 8. [q] Dyer, 48. [r] Co. Litt. 8. [s] 1 Hal. P. C. 357.

operation of which is postponed by the statute 17 Geo. II. c. 39), it is enacted, that after the death of the late Pretender, and his sons, no attainder for treason shall extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself [28]: which provisions have, indeed, carried the remedy farther than was required by the hardship above complained of; which is only the future obstruction of descents, where the pedigree happens to be deduced through the blood of an attainted ancestor [29].

Exception to the rule of escheat in the case of a corporation.

Before I conclude this head of escheat, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat; which is, perhaps, the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told [t], doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant faileth. This is, indeed, founded upon the self-same principle as the law of escheat; the heirs of the donor being only substituted instead of the chief lord of the fee: which was formerly very frequently the case in subinfeudations, or alienations of lands by a vassal to be holden as of himself, till that practice was restrained by the statute of *quia emptores*, 18 Edw. I. st. 1, to which this very singular instance still, in some degree, remains an exception [30].

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[t] Co. Litt. 13.

(28) These provisions in the 7 Ann. c. 21, and 17 Geo. 2, c. 39, are repealed by the 39 Geo. 3, c. 93.

(29) A more general remedy has been provided by the stat. 54 Geo. 3, c. 145, which enacts, that no attainder for felony, after the passing of the act, except in cases of high treason, petit treason, (since abolished), or murder, or abetting or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person other than that of the offender during his life.

As to the effect of attainder for treason on a title or dignity, see *The Braye Peerage Case*, 8 Scott, 108.

Copyholds are not forfeited to the crown, even for treason. (1 Sid. 435; 2 Vent. 38). But in some places, by special custom, the lands escheat to the lord on conviction of felony, without attainder. (3 B. & Al. 511).

(30) The authorities do not agree

Papistry.

There is one more incapacity of taking by descent, which, not being productive of any escheat, is not strictly reducible to this head, and yet must not be passed over in silence. It is enacted by the statute 11 & 12 Will. III. c. 4 [31], that every papist who shall not abjure the errors of his religion by taking the oaths to the government, and making the declaration against transubstantiation, within six months after he has attained the age of eighteen years, shall be incapable of inheriting, or taking, by descent, as well as purchase, any real estates whatsoever; and his next of kin being a protestant, shall hold them to his own use till such time as he complies with the terms imposed by the act. This incapacity is merely personal; it affects himself only, and does not destroy the inheritable quality of his blood, so as to impede the descent to others of his kindred. In like manner as, even in the times of popery, one who entered into religion and became a monk professed was incapable of inheriting lands, both in our own [u] and the feodal law; *eo quod desiit esse miles seculi qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium* [w]. But yet he was accounted only *civiliter mortuus;* he did not impede the descent to others, but the next heir was entitled to his or his ancestor's estate.

These are the several deficiencies of hereditary blood, recognized by the law of England; which, so often as they happen, occasion lands to escheat to the original proprietary or lord.

[u] Co. Litt. 132.

[w] 2 Feud. 21.

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on this point. (See Harg. Co. Litt. 13. b. n.). And see as to an advowson in gross, 1 Roll. Abr. 116, pl. 6.

(31) By the 18 Geo. 3, c. 60, 31 Geo. 3, c. 32, and 43 Geo. 3, c. 30, so much of the 11 & 12 Will. 3, c. 4, as disabled papists to *inherit* by descent, &c., any real estate, &c., or to *purchase* manors, lands, &c., was repealed, provided they took the oath of allegiance, and made the declaration prescribed by 31 Geo. 3, c. 32. And by the latter statute, the 1 Geo. 1, st. 2, c. 55, and 3 Geo. 1, c. 18, requiring papists to register their names and real estates, were repealed, and all deeds and wills of papists declared to be as valid without enrolment as if the said recited acts had never been made.

The Roman Catholic Relief Act, (10 Geo. 4, c. 7, s. 23), enacted, that no oath should be required to be taken by Roman Catholic subjects for enabling them to hold or enjoy any real or personal property, other than such as by law might be required to be taken by other subjects.

CHAPTER XVI.

OF TITLE BY OCCUPANCY.

OCCUPANCY is the taking possession of those things, which before belonged to nobody. This, as we have seen [a], is the true ground and foundation of all property, or of holding those things in severalty, which, by the law of nature, unqualified by that of society, were common to all mankind. But, when once it was agreed that every thing capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating any thing to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognized by the laws of Rome [b], *quod nullius est, id ratione naturali occupanti conceditur.*

Occupancy, special and common, of estate *pur auter vie.*

This right of occupancy, so far as it concerns real property, (for of personal chattels I am not in this place to speak), hath been confined by the laws of England within a very narrow compass; and was extended only to a single instance: namely, where a man was tenant *pur auter vie,* or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestuy que vie,* or him by whose life it was holden: in this case he, that could first enter on the land, might lawfully retain the possession, so long as *cestuy que vie* lived, by right of occupancy [c].

This seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did not revert to the grantor, though it formerly [d] was supposed so to do; for he had parted with all his interest, so long as *cestuy*

[259]

[a] See pages 3 & 8.
[b] Ff. 41. 1. 3.
[c] Co. Litt. 41.
[d] Bract. l. 2, c. 9; l. 4, tr. 3, c. 9, § 4. Flet. l. 3, c. 12, § 6; l. 5, c. 5, § 15.

que vie lived: it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it: much less of so minute a remnant as this: it did not belong to the grantee; for he was dead: it did not descend to his heirs; for there were no words of inheritance in the grant: nor could it vest in his executors; for no executors could succeed to a freehold. Belonging therefore to nobody, like the *haereditas jacens* of the Romans, the law left it open to be seized and appropriated by the first person that could enter upon it, during the life of *cestuy que vie,* under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands; for the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred[1]: against the king therefore there could be no prior occupant, because *nullum tempus occurrit regi*[e]. And, even in the case of a subject, had the estate *pur auter vie* been granted to a man *and his heirs* during the life of *cestuy que vie,* there the heir might, and still may, enter and hold possession, and is called in law a *special occupant:* as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *haereditas jacens,* during the residue of the estate granted; though some have thought him so called with no very great propriety[f]; and that such estate is rather a descendible freehold. But the title of common occupancy is now reduced almost to nothing by two statutes: the one 29 Car. II. c. 3, which enacts (according to the antient rule of law[g]) that where there is no special occupant, in whom the estate may vest, the tenant *pur auter vie* may devise it by will, or it shall go to the executors or administrators, and be assets in their hands for payment of debts; the other that of 14 Geo. II. c. 20, which enacts, that the surplus of such estate *pur auter vie* after payment

Common occupancy abolished, and special occupancy devisable.

[260]

[e] Co. Litt. 41. [f] Vaugh. 201. [g] Bract. ibid. Flet. ibid.

(1) This reason proves too much, since the crown has in every case an equal right with any subject to enter as general occupant.

of debts [2] shall go in a course of distribution like a chattel interest [3].

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(2) The words of the act are transposed, and their meaning altered, in the text; the clause runs thus: "That from henceforth any estate pur auter vie shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence &c., and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands."

The statute does not in terms provide for the case of the executors or administrators being named by express limitation, as special occupants, and it was doubted whether an executor could take under such a limitation, and if he took under it, and not by the statute, whether he was liable to apply the estate as assets, and to distribute it under the stat. 14 Geo. 2, c. 20. (See 7 Ves. 438; 18 Ves. 273; 1 Sch. & Lef. 290). The doubt was scarcely tenable, and has been removed by apt words in the stat. 7 Will. 4 & 1 Vict. c. 26, s. 6.

"These questions on estates pur auter vie do not frequently arise. Such estates certainly are not estates of inheritance: they have been sometimes called, though improperly, descendible freeholds; strictly speaking, they are not descendible freeholds, because the heir-at-law does not take by descent. If an action at common law had been brought against the heir on the bond of his ancestor, he might have pleaded riens per descent, for these estates were not liable to the debts of the ancestor before the Statute of Frauds. That act made them chargeable in the hands of the heir, as assets by descent, if he took by reason of a special occupancy; and if there be no special occupant, it directs that they shall go to the executors, subject to the debts of the testator; and the stat. 14 Geo. 2, c. 20, renders them distributable as personalty. An estate pur auter vie therefore partakes somewhat of the nature of a personal estate; though it is not a chattel interest, it still remains a freehold interest for many purposes; such as giving a qualification to vote for members of Parliament, and to kill game, and some others; a will to dispose of it must also be attested by three witnesses under the Statute of Frauds. If such an estate be given to A. and the heirs of his body, the heirs of the body will take as special occupants, if no disposition be made of it by the first taker; but it is absolutely in his power to make what disposition of it he pleases. (1 Atk. 524; 3 P. W. 266, n. E., and *Grey* v. *Mannock*." Per Lord Kenyon, 6 T. R. 291). An estate pur auter vie limited to A., his executors, administrators, and assigns, is, however, a perfect freehold estate, even in the hands of the executor. (3 Russ. 230).

Although an estate pur auter vie in a copyhold might be limited to the heirs or the executors specially, (2 W. Bl. 1148), if no such limitation was made, there was no general occupancy, because the freehold is always in the lord; and the statutes 29 Car. 2, c. 3, s. 12, and 14 Geo. 2, c. 20, s. 9, appropriating estates pur auter vie, where there is no special occupant, did not extend to copyholds. (7 East, 186). This defect has been supplied by the stat. 7 Will. 4 & 1 Vict. c. 26, s. 6, which places estates pur auter vie in copyholds on the same footing as the like estate in freeholds.

(3) See note (2). The words are, "Such estates pur auter vie in case there be no special occupant thereof,

Common occupancy abolished.

By these two statutes the title of *common* occupancy is utterly extinct and abolished; though that of *special* occupancy, by the heir at law, continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant specially marked out and appointed by the original grant. But, as before the statutes there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like [h], (because, with respect to them, there could be no actual entry made, or corporal seisin had; and therefore, by the death of the grantee *pur auter vie*, a grant of such hereditaments was entirely determined), so now, I apprehend, notwithstanding these statutes, such grant would be determined likewise; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution. For these statutes must not be construed so as to create any new estate, or keep that alive which by the common law was determined, and thereby to defer the grantor's reversion; but merely to dispose of an interest in being, to which by law there was no owner, and which therefore was left open to the first occupant [4]. When there is a residue left, the

[h] Co. Litt. 41. Vaugh. 201.

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of which no devise shall have been made according to the said act, or so much thereof as shall not have been so devised, shall go, be applied and distributed in the same manner as the personal estate of the testator or intestate."

(4) Lord Keeper Harcourt has declared, there is no difference since the 29 Car. 2, c. 3, between a grant of corporeal and incorporeal hereditaments pur auter vie; for by that statute every estate pur auter vie is made devisable, and, if not devised, it shall be assets in the hands of the heir, if limited to the heir; if not limited to the heir, it shall go to the executors or administrators of the grantee, and be assets in their hands; and the statute, in the case of rents and other incorporeal hereditaments, does not enlarge, but only preserves the estate of the grantee. (3 P. Wms. 264).—[CHRISTIAN.] And this opinion has been confirmed by decision, (4 Moo. & P. 848); and corroborated by legislative declaration. (Stat. 7 Will. 4 & 1 Vict. c. 26, s. 6).

In page 113, ante, it is said, that an estate *pur auter vie* cannot be entailed; yet if such an estate be limited to A. in tail, with remainder to B., these limitations are designations of the persons who shall take as special occupants; but any alienation of the *quasi* tenant in tail will bar the interest of him in remainder. See 3 P. Wms. 266, and 6 T. R. 293, where it appears to have been the opinion of Lord Northington and Lord Kenyon, that the tenant in tail of an estate *pur auter*

statutes give it to the executors and administrators, instead of the first occupant; but they will not *create* a residue, on purpose to give it to either [i]. They only meant to provide an appointed instead of a casual, a certain instead of an uncertain, owner of lands which before were nobody's; and thereby to supply this *casus omissus*, and render the disposition of law in all respects entirely uniform; this being the only instance wherein a title to a real estate could ever be acquired by occupancy.

This, I say, was the only instance; for I think there can [261] be no other case devised, wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal, potential* ownership, subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descents, there the law vests an ownership in the king, or in the subordinate lord of the fee, by escheat.

New lands forming in the sea, rivers, &c.

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the law of England assigns them an immediate owner. For Bracton tells us [k], that if an island arise in the *middle* of a *river*, it belongs in common to those who have lands on each side thereof;

[i] But see now the statute 5 Geo. III. c. 17, which makes leases for one, two, or three lives, by *ecclesiastical* persons or any *eleemosynary* corporation, of tithes or other incorporeal hereditaments, as good and effectual *to all intents and purposes* as leases of corporeal possessions.

[k] L. 2, c. 2.

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vie may bar the remainders over by his will alone.—[CHRISTIAN.] The authorities are divided as to the power and effect of a will on an entailed estate pur auter vie. (See 2 Atk. 376; 1 Sch. & Lef. 281; 1 Ball & B. 95; G. Coop. 185). The recent statute of wills appears to make the devise a bar, whether it was not so before or not. Such a quasi entail may be barred before the condition is performed by having issue. (Harg. Co. Litt. 19. a.).

but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law[l]. Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores: for if the whole soil is the freehold of any one man, as it usually is whenever a several fishery is claimed[m], there it seems just (and so is the constant practice), that the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and the soil. However, in case a new island rise in the *sea*, though the civil law gives it to the first occupant[n], yet ours gives it to the
[262] king[o 5]. And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma;* or by *dereliction*, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining[p]. For *de minimis non curat lex:* and, besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry[q]. So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's or the subject's property[6]. In the same manner, if a river,

[l] Inst. 2, 1, 22.
[m] Salk. 637. See p. 39.
[n] Inst. 2, 1, 18.
[o] Bract. l. 2, c. 2. Callis of Sewers, 22.
[p] 2 Roll. Abr. 170. Dyer, 326.
[q] Callis, 24, 28.

(5) Bracton, in the passage cited in support of this position, states our law to be the same as the civil law on this point. (See Hale, de Jure Maris, 17).

(6) See these subjects of alluvion, avulsion, and reliction, and islands arising in the sea and rivers, fully considered, and the cases collected, in the able treatise of Mr. Schultes on Aquatic Rights, who, in pages 115 to 138, draws this conclusion, "that all islands, relicted land, and other increase arising in the sea and in navigable streams, except under local circumstances before alluded to, belong to the crown; and

running between two lordships, by degrees gains upon the one, and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy [7]: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place, as a recompense for this sudden loss [r]. And this law of alluvions and derelictions, with regard to *rivers*, is nearly the same in the imperial law [s]; from whence indeed those our determinations seem to have been

[r] Callis, 28.

[s] Inst. 2, 1, 20, 21, 22, 23, 24.

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that all islands, relicted land, and the soil of inland unnavigable rivers and streams under similar circumstances, belong to the proprietor of the estates to which such rivers act as boundaries; and hence it may be considered as law, that all islands, sand beds, or other parcels of agglomerated or concreted earth which newly arise in rivers, or congregate to their banks by alluvion, reliction, or other aqueous means, as is frequently to be observed in rivers where the current is irregular, such accumulated or relicted property belongs to the owners of the neighbouring estates." (See further, Com. Dig., *Prerog.* D. 61; Bac. Ab., *Prerogative;* 3 B. & Cr. 91; 5 B. & Al. 268; 3 Ad. & El. 554; 5 Nev. & M. 234; 3 B. & Ad. 862). From the case of the *King* v. *Lord Yarborough*, (3 B. & Cr. 91), (though the decision turned rather upon the pleadings and evidence than the general law of alluvion and reliction), and the cases cited, (Id. 102), it may be collected, that if the salt water leave a great quantity of land on the shore, the king shall have the land by his prerogative, and not the owner of the adjoining soil; but not so when dry land is formed gradually, and by insensible imperceptible degrees, by alluvions or relictions, however large it may ultimately become. (2 Bligh, 187; 5 Bingh. 163; 4 B. & Cr. 505). As to unnavigable rivers, there is a case cited in Callis, 51, from the 22 Lib. Ass. pl. 93, which fully establishes the law. "The case was, that a river of water did run between two lordships, and the soil of one side, together with the river of water, did wholly belong to one of the said lordships, and the river by little and little did gather upon the soil of the other lord, but so slowly, that if one had fixed his eye a whole day thereon together, it could not be perceived. By this petty and imperceptible increase, the increasement was got to the owner of the river, but if the river by a sudden and unusual flood had gained hastily a great parcel of the other lord's ground, he should not thereby have lost the same; and so of petty and unperceivable increasements from the sea, the king gains no property, for 'de minimis non curat lex.'" N. B. In the above text, it is supposed "he shall have what the river has left in any other place as a recompense for his sudden loss," but the case in 22 Ass. pl. 93, says that "neither party shall lose *his* land." (Schultes, 136, 137).—[CHITTY.]

(7) And the same rule holds good as between the crown and a subject in the case of a gradual encroachment of the sea. (5 Mee. & W. 327).

drawn and adopted: but we ourselves, as islanders, have applied them to *marine* increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before mentioned, as upon this other general ground of prerogative, which was formerly remarked[t], that whatever hath no other owner is vested by law in the king.

[t] See Vol. I. p. 298.

CHAPTER XVII.

OF TITLE BY PRESCRIPTION.

A THIRD method of acquiring real property by purchase is that by *prescription;* as when a man can shew no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it. Concerning customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, we inquired at large in the preceding part of these commentaries[a]. At present therefore I shall only, first, distinguish between *custom,* strictly taken, and *prescription;* and then shew what sort of things may be prescribed for.

Distinction between custom and prescription.

And, first, the distinction between custom and prescription is this: that custom is properly a *local* usage, and not annexed to any *person;* such as a custom in the manor of Dale that lands shall descend to the youngest son: prescription is merely a *personal* usage; as, that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege[b]. As for example, if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation, (which is held[c] to be a lawful usage), this is strictly a custom, for it is applied to the *place* in general, and not to any particular *persons:* but if the tenant who is seised of the manor of Dale [264] in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the *person* of the owner of this estate. All prescription must be either in a man and his ancestors [1], or in a man

[a] See Vol. I. p. 75, &c.

[b] Co. Litt. 113. [5 Nev. & M. 308. 1 Nev. & P. 172.] [c] 1 Lev. 176.

(1) Or in a corporation and its predecessors: see 1 Saund. 342.

and those whose estate he hath [d]: which last is called prescribing in a *que estate*. And formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended [e] for an indefinite series of years [2]. But, by the statute of limitations, 32 Hen. VIII. c. 2, it is enacted, that no person shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within threescore years next before such prescription made [3 f].

What may be prescribed for.

Secondly, as to the several species of things which may, or may not, be prescribed for: we may, in the first place, observe, that nothing but incorporeal hereditaments can be claimed by prescription: as a right of way, a common, &c.; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had [g]. For a man shall not be said to prescribe, that he and his ancestors have immemorially used to hold

[d] 4 Rep. 32.

[e] Co. Litt. 113.

[f] This title, of prescription, was well known in the Roman law by the name of *usucapio*, (Ff. 41. 3. 3.), so called, because a man, that gains a title by prescription, may be said *usu rem capere* [4].

[g] Dr. & St., Dial. 1, c. 8. Finch, 132.

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(2) See 6 Mee. & W. 542; 6 Jur. 837; 6 Scott, 167; 11 Ad. & E. 819. The inference from the evidence of enjoyment may be more extensive than the facts proved, as from proof of pasturage of all the cattle kept by the claimant may be inferred a right of common for sheep, although he never kept sheep, (4 B. & Cr. 161); or proof of holding a market in certain places within a manor may be evidence of the lord's right to hold the market in any convenient place within the manor. (5 Ad. & E. 456; 3 Nev. & P. 57. See 3 Scott, N. R. 751). A right acquired by prescription may be lost by abandonment or non-user. After twenty years of non-user, the court would generally presume that the right had been released, and abandonment may be inferred from unequivocal acts, within a much shorter time, as by pulling down a wall, in which was an ancient light, and erecting a blank wall in its place. (3 B. & Cr. 336; 3 Ad. & El. 325. See 5 Moo. & P. 712; 2 C., M. & R. 34; Com. Dig. *Præscription*, (E. 2); 6 Jurist, 837). The Statute of Limitations, stated infra, is applicable to these rights. (7 Ad. & E. 701).

(3) See a statement of the present law of limitation, infra, p. 266, n.

(4) There was a striking distinction, however, between the Roman usucaptio and the English prescription, in that the former was exclusively applicable to corporeal hereditaments, the latter to those of an incorporeal nature only.

the castle of Arundel: for this is clearly another sort of title; a title by corporal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But, as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage. 2. A prescription must always be laid in him that is tenant of the [265] fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates[h]. For, as prescription is usage beyond time of memory[5], it is absurd that they should pretend to prescribe for any thing, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple; and must plead that John Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life[6]. 3. A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in

[h] 4 Rep. 31, 32.

(5) (As to legal memory, vide ante, p. 31). Therefore, a prescription cannot be, where the thing to which it relates was created within the time of legal memory. (Lofft, 76. See Cowp. 108).

(6) Where a *copyholder* claims common or other profit in the *lord's soil*, he cannot prescribe for it in his own name, on account of the baseness and weakness of his estate, which, in consideration of law, is only a tenancy at will; neither can he prescribe in the lord's name, for *he* cannot prescribe for common or other profit in his own soil, therefore of necessity the copyholder must entitle himself to it by way of *custom* within the manor. But where a copyholder claims common or other profit in the soil of a *stranger*, which is not parcel of the manor, he must prescribe in the name of the lord; namely, that the lord of the manor and his ancestor, and all those whose estate he has, have had common, &c. in such a place for himself and his customary tenants, &c., and then state the grant of the customary tenement; for the lord has the fee of all the copyholds of his manor. (4 Rep. 31 b; 6 Rep. 60 b; Hob. 86; Cro. Eliz. 390; Moore, 461; 1 Saund. 349).—[CHITTY.]

supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus, the lord of a manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by prescription[i]. 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands, felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record[k 7]. 5. Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate*, (that is, in himself and [266] those whose estate he holds), nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence, or appendix of an estate, with which the thing claimed has no connexion[8]: but, if he prescribes in himself and his ancestors, he may prescribe for

Matter of record not.

[i] 1 Vent. 387. [See 5 Nev. & M. 513.] [k] Co. Litt. 114.

(7) The reason for this distinction is not very satisfactory; though the forfeiture must be matter of record, there seems no ground why the right to receive that forfeiture might not be claimed by prescription; at all events, there is some inconsistency, for a man may prescribe for a court leet, which is a court of record, as well as for a county palatine, and by reason thereof to have the forfeitures in question. (Co. Litt. 114. b.)—[COLERIDGE.] The meaning seems to be, that where the forfeiture is evidenced by record, the title must necessarily appear by the same record, and so should not be proved by inferior evidence; but where the claim is to hold the court itself, the record cannot be evidence of the title on which its own validity depends, and so evidence of prescription is necessarily admitted. Accordingly, where in the *case of the Abbot of Strata Mercella*, the objection was urged that the original charter might be lost, it was answered, that if the enrolment of it could not be found, yet allowances in eyre (as by the law ought to be) are of record of all such franchises, by which it appears, that by force of these charters such franchises were allowed. (9 Rep. 25).

(8) See 6 Ad. & El. 530.

anything whatsoever that lies in grant: not only things that are appurtenant, but also such as may be in gross[1]. Therefore a man may prescribe, that he, and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as *appendant* to that manor; but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also a man may prescribe in a *que estate* for a common *appurtenant* to a manor; but, if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors. 6. Lastly, we may observe, that estates gained by prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo*: and therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the prescription in this case being indeed a species of descent[9]. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase; for every accessory followeth the nature of its principal[10].

[1] Litt. § 183. Finch, L. 104.

(9) A prescriptive right in gross, as, for instance, to take the herbage of a particular field, will, of course, until aliened, descend only to the blood of the line of ancestors in which the prescription is made; but such a right may be granted to a stranger, to whose heirs it will descend, like any other purchase, and he and his heirs will then prescribe in the name of the grantor and his ancestors. (6 M. & W. 511).

(10) The old doctrine was, that a title could only be made to an incorporeal hereditament by express grant or charter, or by prescription; and a claim by prescription, although it might be supported in the first instance by evidence of uninterrupted modern usage during a period of thirty years, or even less, (3 Nev. & P. 260), yet it was liable to be rebutted by evidence to the contrary, referring to any period of time, however remote, so that it was subsequent to the year 1189. (Ante, p. 32, n. 29; 1 Cr., M. & R. 891). And this rule formerly applied to every claim to an incorporeal right rested upon mere evidence of enjoyment, without any direct evidence of a grant. (Cro. El. 118). But in modern times, the inconveniences attending the proof and support of a prescription induced the courts to sanction a new mode of establishing certain incorporeal rights, by presuming, from sufficient evidence of enjoyment, a modern grant which has been

lost. Evidence of twenty years' user as of right against the owner of the fee, and those deriving under him, was accordingly held sufficient, if unexplained, to authorize the jury to presume such a grant, even against the crown; and positive proof of the non-existence of such right at any time before the twenty years did not of necessity form any objection to such presumption. (1 M. & Mal. 400; 2 B. & Pul. 206; 11 East, 284; 1 Cr., M. & R. 217, 222, 893; 1 C. P. Coop. 239). This period of twenty years was adopted in analogy to the provisions of the Statute of Limitations of James I.; but there was no arbitrary rule; enjoyment for a shorter period, supported by corroborative evidence, might be sufficient; while enjoyment for a much longer period, under less favourable circumstances, might be insufficient to raise the presumption. (6 East, 214; 2 Saund. 175). The presumption of a grant was only resorted to when the evidence was not such as would support a prescription. (3 Ad. & El. 584). "Such presumptions did not always proceed on a belief that the thing presumed had actually taken place, but, as is properly said by Mr. Starkie in his excellent Treatise on Evidence, vol. 2, p. 669, (in 3rd ed. vol. 3, p. 911), 'a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation.' And though in theory it was presumptive evidence, in practice and effect it was a bar." (But see 5 Nev. & M. 313). The liberty of presuming grants in this manner has been somewhat narrowed by the 6th section of the statute 2 & 3 Will. 4, c. 71, which enacts, that, in all cases provided for by that act, no presumption shall be allowed in favour of any claim upon proof of enjoyment for a shorter period than that applicable to the case under the act. (Vide infra, and 1 Cr., M. & R. 222).

In aid of the acquisition of rights to light and air, and to divert or obstruct ancient streams, it had long been the practice to make presumptions of this kind. With respect to water, it has been seen that every one has a right to have the water which passes over his land to continue to flow in its ancient channels, and no one can either divert any part of it from above or dam it up from below his land, to his injury, (ante, p. 18, n. 7). But acquiescence in such interference during twenty years was generally a bar to the right to complain of it, (6 East, 208, 213): a rule to which this qualification must be added, that if the course of the water has been by an *artificial* channel, the owner of the land over which it passes does not necessarily acquire a right to its continuance after a lapse of twenty years, unless he has appropriated it to some use; because the right to such artificial flow of water must be founded on the supposition of a grant, a presumption which would be strongly opposed by the fact that no use has been made of the subject-matter; but with respect to natural streams user is immaterial, and the diversion of them, however useless they may have been, can only be justified by license or prescription. (See 5 M. & W. 220; 3 Per. & D. 367; 5 B. & Ad. 1).

The right to air and light stands on a different footing from other incorporeal rights. "Every man in his own land has a right to all the light and air which will come to him, and he may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light, he does not require any consent from the owners of the adjoining land. He therefore begins to acquire the right to the enjoyment of the light by mere occupancy. After he has erected his building, the owner of the adjoining land may afterwards within twenty years build upon his own land, and so obstruct the light which would other-

wise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who had erected the building upon his land shall continue to enjoy the light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not indeed imply that the consent is given by way of grant, for although a right of common (except as to common appendant), or a right of way, being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grant; yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant, which the law would imply, not to interrupt the free use of light and air. The right, therefore, is acquired by mere occupancy, and ought to cease when the person who so acquired it discontinues the occupancy. If, therefore, as in this case, the party who has acquired the right once ceases to make use of the light and air which he had appropriated to his own use, without shewing any intention to resume the enjoyment, he must be taken to have abandoned the right." (Per Littledale, J., 3 B. & Cr. 340). The right to have one's house supported by the abutment of one's neighbour's soil is of a similar nature, and can only be gained by grant, either actual, or presumed from open enjoyment for at least twenty years. (3 M. & W. 220).

A claim by prescription was liable to be defeated, as has been seen, by evidence of non-existence, at any time, however remote, if within the period of legal memory; and the modern remedy for this inconvenience, by presuming a grant of moderate antiquity, was not considered to be satisfactory in principle, and was uncertain and inconvenient in practice. (See 5 Nev. & M. 313). To supply the imperfection of the law, Lord Tenterden's "Act for shortening the time of Prescription in certain cases" (2 & 3 Will. 4, c. 71) was passed. It applies to rights of common, (5 M. & W. 298; 6 Id. 542; 7 Id. 63), or other *profit* or *benefit* (as distinguished from *easements*, ante, p. 32, n. (30)), claimed by custom, prescription, or grant, to be exercised in alieno solo; to "any way or other easement, watercourse, (1 M. & W. 77), or use of any water;" and to "the access and use of light to or for any building;" but with a difference as to each of these three classes of rights. Tithes, rents, and services, are excepted from the operation of the statute.

The prescription act; 2 & 3 Will. 4, c. 71.

As to rights of common and other profits à prendre, the effect of proof of enjoyment *as of right*, and without *interruption* (as distinguished from mere intermission of user, 1 M. & Rob. 382; 6 Jurist, 837; and see 6 Scott, 167; 6 M. & W. 540) for thirty years, in support of a claim which may lawfully be made at the common law, by *custom, prescription, or grant**, is not to be defeated by shewing the commencement of the enjoyment at any time prior to the thirty years, though it may be defeated in any *other* way in which, at the common law, such a claim might have been defeated. Thus, it may be defeated by shewing that the enjoyment for thirty years was by a *parol* license, covering the whole time;

* See 1 C., M. & R. 218; and in illustration, the observations on the Tithe Prescription Act, ante, p. 32; n. (29).

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for that, at common law, would have rebutted the presumption of a grant. (6 Nev. & M. 239). Such a license must be specially replied to a plea of prescription under the act (Ib.); although occasional licenses, or a general license not covering the whole time, being inconsistent with a continuous enjoyment as of right, may be given in evidence under a general traverse of the enjoyment. (Ib.; 1 C., M. & R. 614; 3 Scott, 262). Again, if the enjoyment at the commencement of the period was by special authority, (as under an act of Parliament), which expired during the period, and the enjoyment for the rest of the period was adverse; these facts, not being inconsistent with a continuous enjoyment as of right during the whole period, cannot be evidence in a traverse of the enjoyment; although, if specially replied, they would shew that the claim could not be supported as a claim by "custom, prescription, or non-existing grant." (6 M. & W. 805).

But the time during which any person otherwise capable of resisting such claim shall have been infant, non compos, feme covert, or tenant for life, or during which any action shall have been pending, and diligently prosecuted until abated by death, is to be excluded in the computation of the thirty years.

Upon proof of such enjoyment for sixty years (without regarding any disability), the right is to be deemed absolute and indefeasible by any means, except by shewing its origin by some express consent or agreement in writing; that is to say, by shewing its origin under such an agreement *prior* to the commencement of the period of sixty years; for an enjoyment even by parol agreement *within* the period is not such an enjoyment as of right as the act requires. (6 Nev. & M. 230).

The periods of thirty and sixty years are to be deemed and taken to be the periods *next* before *some* suit or action wherein the claim or matter *shall have been* or shall be brought in question. (As to the meaning of which words, see 11 Ad. & El. 788; 7 M. & W. 536; 2 Gale & D. 181). It seems, that unless the claimant's title has been established in some previous action, there must be direct evidence of enjoyment within the year preceding the commencement of the action in which his title is disputed, and not within the year preceding the act complained of. (3 Nev. & P. 75; 7 Ad. & El. 702, 707; 8 Cl. & Fin. 23). But if there is such evidence, proof of enjoyment *prior* to the commencement of the period may be admitted as evidence of the state of things at the commencement of the period. (4 Ad. & E. 890). Of course, an ancient right, founded on prescription, and derived by the present claimant by assignment from him with whose ancestors the prescription commenced, will not be defeated by evidence of modern interruption for a period insufficient to confer an adverse title under the Statute of Limitations. (6 M. & W. 541).

Nothing is to be deemed an interruption, unless *submitted to or acquiesced in* for one year after notice to the party interrupted. So, that an enjoyment for twenty-nine years and a fraction, followed by an interruption not acquiesced in for a whole year, constitutes an enjoyment for thirty years under the act, (8 Cl. & Fin. 231; 3 Per. & D. 442); and if there be any series of interruptions, each for less than a year, the enjoyment will suffice, although it be taken against the will of the owner, who endeavours to interrupt it. (Ib.)

The same provisions apply to claims "which may lawfully be made at the common law, by custom, prescription, or grant*, to any way or other ease-

* Therefore, where the enjoyment during part of the period was under an Act of Parliament, which ceased to apply, and for the remainder of the pe-

ment, or to any watercourse, or the use of any water," to be enjoyed in solo alieno; except that the periods are respectively twenty and forty years. But there is a further provision, in respect of these rights only, that where the servient tenement has been held for any term, for life, or exceeding three years from the granting thereof, the time of enjoyment during the continuance of such term shall be excluded (see 2 Gale & D. 181) in the computation of the period of *forty years*, in case, within three years following the determination of the term, the claim shall be resisted by the *reversioner*. (1 M. & W. 100). And this provision has been construed to apply also to the period of twenty years. (1 Cr., M. & R. 220; see 3 Scott, 264).

It has been already observed, that the acquisition of a right to *light* stands upon a peculiar ground; and accordingly it has been made the subject of a distinct provision, containing no qualification or reference to the common law; it being simply enacted, that the "actual enjoyment" (whether *as of right* or not is immaterial) of the access and use of light to or for any building, during twenty years, without interruption, and not by virtue of any consent or agreement in writing, shall confer an absolute and indefeasible right. (See 11 Ad. & E. 695).

Lastly, it is enacted, that in the several cases provided for by the act, no presumption founded on enjoyment for a shorter period than that applicable under the act to the case in question, is to be admitted. This proviso is, evidently, only a qualified exclusion of the common law, which seems clearly, except so far as these words control it, to be still applicable, concurrently with the statute, as well as to cases which are not affected by it. (See 6 Scott, 167; 1 C., M. & R. 222; 3 Nev. & P. 72; 4 M. & W. 496; 6 Id. 542). The prescription act.

The principal difficulty in applying this statute is to determine what is a sufficient continuous enjoyment *as of right* to satisfy it. There must be an enjoyment of the easement, &c., as such, and as of right for such continuous period as is applicable to the particular case, next before the commencement of the suit. If the benefit has been enjoyed openly for a year or two, and afterwards uniformly by permission asked on each occasion; or if it has been enjoyed secretly and by stealth (3 M. & W. 229) for several years, and then openly, such enjoyment does not count as an enjoyment under the act. "The words *as of right* cannot be confined to an adverse right from all time, as far as evidence shews; for if they were so confined, such enjoyment once confessed, could not be avoided by replying, that it was had by contract, which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words cannot be confined to enjoyment

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riod the enjoyment was adverse; the claim was held not to be such as the act contemplated. (6 M. & W. 806). But in 1 Cr., M. & R. 220, an enjoyment for twenty years against the lessee of a bishop, being (on account of the lease, see sect. 8) insufficient to confer a right against the bishop, was held to confer no right against the lessee; and one reason given was, that the act being made "for shortening the time of *prescription*," could not contemplate any enjoyment that would not give a title, as prescription does, against all the world. The court seems to have forgotten that the words in the body of the act extend the meaning of the word "prescription," in the title, to all claims that would be supported by custom, prescription, or inference of non-existing grant (6 M. & W. 806; see 5 Id. 203); and, besides, that if the claim in question is not within the act, it is then left as a question of presumption for the jury, at common law. (3 Nev. & P. 72).

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under a strict legal right, for then a consent or agreement in writing *not under seal* (of which the second section speaks) could not account for such enjoyment. The words, therefore, must have a wider sense, and yet they must have the same sense as the words 'claiming right thereto' in the second section, otherwise there will be incongruities in the construction of the act. It seems, therefore, that the 'enjoyment as of right' must mean an enjoyment had, not secretly, or by stealth, or by strict sufferance, or by permission asked from time to time, on each occasion, or even on many occasions of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person *claiming* to use it without danger of being treated as a trespasser, *as a matter of right*, whether strictly legal, by prescription and adverse user, or by deed conferring the right, or though not *strictly* legal, yet *lawful to the extent of excusing a trespass*, as by a consent or agreement in writing not under seal, in case of a plea of enjoyment for forty [or sixty] years, or by such writing, or by parol consent or agreement, contract, or license, in case of a plea of enjoyment for twenty [or thirty] years." (6 Nev. & M. 238; see 1 C., M. & R. 219, 631; 3 Scott, 263; 4 M. & W. 500).

Enjoyment under a parol license during an entire year within the period, would, therefore, be an interruption to the continuous enjoyment as of right, contemplated by the act. Again, unity of possession (of which unity of seisin is primâ facie evidence) is admissible to shew that the enjoyment during any part of the period (not being less than a year) was not enjoyment of the easement, &c., *as such*. (4 M. & W. 496; 2 Gale & D. 183; 10 M. & W. 699). (It must not be forgotten that unity of possession of the dominant and servient tenements does not necessarily do more than *suspend* the easement; an absolute *extinguishment* can only be effected by unity of *seisin* or title. 2 C., M. & R. 41). See further on this subject, Gale & Whatley on Easements, passim.

Somewhat analogous to the *creation* of incorporeal rights by prescription, is the *acquisition* of a legal title to *existing* hereditaments, by long enjoyment. At the common law, no length of adverse possession seems to have been sufficient to bar the rightful owner, unless the land was actually recovered from him in a real action of a particular form, and he took no steps for reversing the judgment within a year and a day; but various statutes were successively passed for limiting the period for bringing a writ of right, (formerly the ordinary mode of trying the title to real property), which, till the 32nd Hen. 8, was not any certain period before the commencement of the suit, but dated from some historical event fixed from time to time, as, the beginning of the reign of Henry I., the return of King John out of Ireland, the coronation of King Richard I., &c. (First Real Prop. Rep. 51; Stat. Westm. 2nd, c. 46). By the stat. 32 Hen. 8, c. 2, the time for bringing a writ of right on the seisin of an ancestor was limited to sixty years from the commencement of the adverse possession; and for a possessory action on an ancestor's seisin, the time was fifty years. No person was to bring a real action, droitural or possessory, on his own seisin, after thirty years; and real actions by remaindermen and reversioners, and avowries and conuzances for rents and services, were limited to fifty years. This statute did not limit a right of entry, or an action of ejectment founded on such right; nor was the time for exercising such a right limited by the common law, otherwise than by the operation of a descent cast, discontinuance, or warranty. (See Vol. 3, pp. 176, 191). But the statute 21 Jac. 1, c. 16, while it limited all writs of formedon (*i. e.* real actions by remaindermen,

reversioners, or issue in tail) to twenty years, also provided, that no person should make entry into any lands, but within twenty years after his right of entry accrued; with a saving of the rights of persons under disabilities.

Actions in which it was unnecessary to allege any seisin, such as actions of dower, escheat, waste, &c.; the action of quare impedit, by which the right to an advowson is tried; and suits by lay impropriators for tithes, were not subject to any period of limitation. (First Real Prop. Rep. 39, 40).

The statute of James I. and the previous statutes of limitation did not declare, that adverse possession for any time should extinguish the *title* of the rightful owner, but merely limited his right to recover by action or entry; and hence the law of limitation has been treated as belonging "ad ordinationem litis," forming a branch of the practice of the courts, rather than a substantive law of real property. (See 2 Scott, 304; 5 Cl. & Fin. 1). Accordingly the subject has hitherto found a place in the third book of these Commentaries; but now that the recent statute has declared that lapse of time shall not only bar the forensic remedy, but also shall actually *extinguish the right and title* of the person out of possession, (3 & 4 Will. 4, c. 27, s. 34), the law of limitation of rights to real property belongs more properly to the present division of the work.

The provisions of the statute are too numerous, and its construction in some respects is too difficult, to allow of more than a general outline of its operation being attempted in this place.

The greater part of its provisions are confined to claims to "land" and "rent," words which have a peculiar meaning throughout the act,—the word "land" signifying manors, messuages, and all other corporeal hereditaments, and tithes (not belonging to a spiritual or eleemosynary corporation sole), and also any share, estate, or interest in them or any of them, whether of a freehold or chattel interest, and of whatever tenure; the word "rent" extending to all heriots, and to all services and suits for which distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole). But (except by the provisions applicable to the recovery of *arrears* of rent) the statute does not provide any bar for the recovery of a rent reserved upon a lease for years, that being a mere incident to the reversion; so that, after non-payment for more than twenty years, if the reversion continues, the reversioner's title to the rent, as distinguished from the arrears beyond six years, is not barred. (9 M. & W. 113). The second section, about to be stated, applies only to freehold rents, of which a *seisin* can be had. Statute of Limitations.

The second section enacts generally, that (after the year 1833) "no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years after the time at which the right to make such entry or distress, or to bring such action, shall have *first accrued* to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress shall have first accrued to the person making or bringing the same."

This general enactment is explained and qualified by subsequent sections, which include within their purview almost every possible case; and those few cases, (such as claims under wills), which are not within any of these explanatory clauses, have been held to be left to the general operation of the second section. (4 Scott, 168).

At the common law, the rightful owner, having once been in the actual seisin of an estate, could only have

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been put to his entry by an actual disseisin; and there were many ways in which a stranger might have been in the actual enjoyment of the land for his own benefit, without having disseised the true owner; and during such non-adverse possession, the time of limitation under the stat. of James I. did not run. (1 Salk. 242; 1 Burr. 60; 10 B. & Cr. 816; 4 Nev. & M. 477). But the distinction has been abolished by the recent act, which has done away with the doctrine of non adverse possession. (2 M. & W. 911; 3 Nev. & P. 548). This effect is accomplished by the explanatory provisions, of which I proceed to notice the most important.

Where the person claiming, or some one through whom he claims, having been in possession or in receipt of the profits, shall have been *dispossessed* or have *discontinued* such possession, the right to enter is to be deemed to have first accrued at the time of such dispossession or discontinuance. (Sect. 3; 4 Nev. & M. 664).

Where the claim is made to the estate or interest of some person who died in possession or receipt of the profits, and was the last person who had such possession or receipt, the period is counted from his death. (Sect. 3).

Where the title is derived from an instrument (not being a will), made by a person being in possession, &c., *in respect of the same estate or interest*, and no possession has been had under such instrument, the right accrues at the time indicated by the instrument. There seems to be a doubt whether the words "in respect of the *same* estate or interest" confine this part of the clause to cases where the whole estate or interest of the grantor passes by the instrument. A person claiming as lessee under a lease for life by a tenant in fee, can scarcely be said to claim the same estate as that of which his lessor was possessed. (See 4 Scott, 180). If this doubt is well founded, such cases, as well as claims under wills, (which are expressly excepted in this explanatory section), fall under the general words of the 2nd section. (Ib.).

The right to enter in respect of a remainder or reversion first accrues on the determination of the next preceding estate, and the remainderman or reversioner has twenty years from that time, except in the cases where his right is expectant on the determination of a tenancy at will, from year to year, for years in certain cases, or in tail. And where a remainderman or reversioner has a right to enter for a forfeiture or condition broken, he may do so within twenty years, but his neglect to enter on that ground will not prejudice his right on the natural determination of the particular estate.

Where a tenancy at will has been created, it is, for the purposes of the act, to be considered to have determined at the end of a year from its commencement, from which presumed, or any *previous* actual, determination of the will, the period of limitation is to be reckoned; and the possession continues to be adverse until the true owner recovers actual possession, or obtains from the occupier a sufficient acknowledgment of title in writing. (Sect. 14. See 7 M. & W. 226). A cestui que trust or mortgagor in possession is considered at law as tenant at will to his trustee or mortgagee, but it is expressly provided, that such a tenancy shall not constitute adverse possession. Doubts which arose as to the effect of the act upon the rights of a mortgagee out of possession (6 Nev. & M. 816) were removed by the stat. 7 Will. 4 & 1 Vict. c. 28, which directs the twenty years to be counted from the last payment of any principal or interest under the mortgage.

Where the possession is in a tenant "from year to year or other period," without writing, the time is counted from the end of the first of such years or other periods, or the last payment of rent. (Sect. 8).

Where the possession is under a lease in writing, reserving a yearly rent of twenty shillings or upwards, the period may commence before the determination of the term, viz. at the time when rent shall have been first received by some person wrongfully claiming it as the immediate reversioner, provided no subsequent payment has been made to the true owner. (Sect. 9). And the landlord is barred for the benefit, not of the tenant, but of the person so wrongfully receiving the rent. (Sect. 35). Mere discontinuance of the receipt of the rent is no bar; there must be a wrongful payment to another. (7 M. & W. 131; 3 Beav. 308).

Where there is a lease in writing, and no pecuniary rent to the amount of twenty shillings is reserved, the period is reckoned from the determination of the tenancy.

Possession adverse to the issue in tail did not formerly commence to be adverse to the remainderman or reversioner until after failure of issue in tail; but now, as soon as the time commences to run against a tenant in tail, it runs also against all those whom he might have barred, whether he lives through the whole period of limitation or not. (Sects. 21, 22). If the possession has been obtained under a conveyance by the tenant in tail, binding on himself but not on his issue, the possession does not commence to be adverse until his death; so possession under an assurance which creates a base fee (*i. e.* which, being made by tenant in tail in remainder, &c., bars the issue in tail, but not the remainders over) is not adverse while there is issue in tail. But, by sect. 23, possession under any assurance by tenant in tail, inoperative against those in remainder or reversion, (or, after such possession has once been had, possession by any person not entitled in respect of any interest expectant on the estate tail), commences to be adverse to those in remainder or reversion, when the time arrives at which (but for such assurance) *a like assurance* executed by the tenant in tail for the time being, would, without the consent of any other person, have barred them. Statute of Limitations.

What shall be deemed adverse possession in particular cases is for further certainty specified in some additional clauses.

The receipt of rent from a tenant from year to year, or other lessee, is to be deemed the receipt of the profits. (Sect. 35).

A mere entry or continual claim shall not keep alive any right. (Sects. 10, 11).

The possession of a coparcener, joint-tenant, or tenant in common, for the benefit of himself or any other person than his coparcener, &c., is to be deemed adverse, (sect. 12); and the possession of a younger brother or other relation is adverse to the heir. (Sect. 13).

Possession commences to be adverse to an administrator on the death of the intestate. (Sect. 6). Formerly, the time was counted from the grant of the letters of administration.

A further time beyond the period of twenty years is allowed in case of disability by reason of infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, *existing at the time when the right first accrued, in the person to whom it accrued.* Such person, or those claiming through him, are allowed ten years from the time of the cesser of *such* disability. But this provision does not extend (as the old statute did, 4 Taunt. 830,) to a succession of disabilities, and whatever disabilities may have existed, the claim is barred at the end of *forty* years. (Sects. 16, 17, 18). No part of the United Kingdom, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to them, (being part of the British dominions), shall be deemed to be "beyond seas," within the act. (See 3 You. & C. 617).

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There was no statutory period of limitation applicable to equitable claims; but courts of equity adopted a rule, in analogy to the legal limitation of rights of entry, and refused, except under particular circumstances, (such as disabilities, mistake, &c.), to listen to any application for relief after twenty years. (2 Sch. & Lef. 630; 2 You. & C. 58). In cases of express trust, there was no fixed rule as to the time that should bar the cestui que trust from relief against his trustee; and relief has been given under the circumstances, after a laspe of forty-five years, or even a longer period; but stale demands of this sort were not regarded with favour. (See 2 Ves. jun. 283; 17 Ves. 97; 1 Jac. & W. 51; 4 Myl. & Cr. 52). In cases of *implied* trust, as where a purchase was made, or mortgage taken, with notice of the claims of other persons, the strict rule at law was followed, except in cases of charitable trusts, (3 Myl. & K. 344); and an adverse enjoyment of an equitable interest was subject to the same rule; as, where A. being trustee of an estate for B. pays the rents to C., or suffers him to enjoy the estate for twenty years. (4 Bligh, 1; 2 Russ. & M. 675).

The statute has not provided for every case of equitable cognizance, and where it has interfered, it has not made any considerable alterations in the existing practice. The favour which was shewn to charitable trusts is abolished, (but see 1 Con. & Laws. 82), and, in cases within the act, ignorance or mistake can no longer be admitted to extend the time. Claims to legacies, and money charged or secured upon land, are also subject to an express limitation.

Sect. 24 enacts, that no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which under the act he might have prosecuted his claim at law, if it had been a legal claim. But the next section provides, that in case of express trusts, the statute shall create no bar as between the trustee and the cestui que trust; but the right of the latter shall be deemed to have first accrued when the subject-matter of the trust shall have been conveyed to a purchaser for valuable consideration, and then only as against such purchaser, and persons claiming through him. And in case of a concealed fraud, the time commences to run against parties and privies to the fraud only, where the fraud is, or with reasonable diligence might have been, discovered. (Sect. 26). A mortgagor is to be barred from redeeming after twenty years from the time when the mortgagee obtained possession or receipt of the rents, or from the last written acknowledgment of the mortgagor's title.

By sect. 40, suits to recover money charged on or payable out of land or rent, or legacies, (though not charged on land, 9 Sim. 567; 2 You. & C. 200; 2 Myl. & Cr. 309), are subject to the general rule of limitation.

Cases of express trust, as between the trustee and cestui que trust, are not within any of these provisions, (except in the case of mortgages), but are left subject to the former rule in equity; it being provided, that nothing in the act shall interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by the act. (Sect. 27).

Claims by bishops, parsons, and other ecclesiastical and eleemosynary corporations sole, to land or rent, are to be barred after sixty years, and such further time as shall be necessary to include the whole or the latter end of one incumbency, the whole of the next, and the first six years of the next incumbency after that, have elapsed from the time when the right first accrued. (Sect. 29).

Claims to advowsons are to be bar-

red after sixty years, and such further time as shall include three adverse incumbencies, excluding prerogative presentations after promotions to bishoprics, but including collations or presentations after lapse. (Sects. 30, 31). And, under any circumstances, no advowson is to be recovered after the lapse of 100 years from the last rightful presentation.

It remains to notice a few miscellaneous clauses, not mentioned in the preceding general summary.

By sect. 34, after the remedy of the rightful owner shall have been barred under the act, his *right and title* shall also be extinguishes. This enactment essentially distinguishes the effect of the act under consideration from that of the old acts, which merely barred the active remedy by suit, entry, or distress. (2 Con. & Laws. 192).

Where, after the commencement of adverse possession, the party in possession, by writing under his hand, (or, in cases of legacies, or money secured on land, by writing under the hand of his agent,(sect. 40)), shall acknowledge to the true owner or his agent that the right is in him, the right is to be deemed to have accrued at the date of such acknowledgment. (Sects. 14, 28).

By section 36, a variety of real and mixed actions particularly specified, which had become obsolete, and all other real and mixed actions, and plaints in the nature of such actions, except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment, and a plaint for freebench or dower, are abolished, with a saving of existing rights in certain cases. Statute of Limitations.

As a descent cast, discontinuance, or warranty operated in many cases to defeat the true owner's right of entry, and to deprive him of any remedy except by real action, a necessary appendage to this abolition of real actions was the enactment, in the next section, that no right of entry should be tolled or defeated by such means.

There are two clauses limiting the right to recover arrears in certain cases to *six* years. Sect. 41 applies to arrears of dower. Sect. 42 enacts, that no arrears of rent or of interest in respect of money charged on land or rent, or in respect of any legacy, or any damages in respect of such arrears, shall be recovered, but within six years next after the same shall have become due, or an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent; except in cases where a prior mortgagee or incumbrancer has been in possession or receipt of the profits. But by a later act of the same session, (3 & 4 Will. 4, c. 42, s. 3), this period is extended to twenty years in cases of actions of debt for rent on an indenture of demise, or actions generally of debt or covenant on any bond or other specialty; and the same period in respect of such claims by specialty is allowed in equity, even as against the land charged. (3 Scott, 120; 4 Per. & D. 229; 2 Hare, 326. See 2 Con. & Laws. 223).

CHAPTER XVIII.

OF TITLE BY FORFEITURE.

FORFEITURE is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments: whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained.

Causes of forfeiture.

Lands, tenements, and hereditaments, may be forfeited in various degrees and by various means: 1. By crimes and misdemesnors. 2. By alienation contrary to law. 3. By non-presentation to a benefice; when the forfeiture is denominated a *lapse*. 4. By simony. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.

1. For crimes and misdemeanors.

I. The foundation and justice of forfeitures for *crimes and misdemesnors*, and the several degrees of those forfeitures proportioned to the several offences, have been hinted at in the preceding volume[a]; but will be more properly considered, and more at large, in the fourth book of these commentaries. At present I shall only observe in general, that the offences which induce a forfeiture of lands and tenements to the crown are principally the following six: 1. Treason. 2. Felony[1]. 3. Misprision of treason. 4. *Praemunire*. 5. Drawing a weapon on a judge, or striking any one in the presence of the king's principal courts of justice. 6. Popish recusancy, or non-observance of certain laws enacted in restraint of papists[2]. But at what time they severally commence, how far they extend, and how long

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[a] Vol. 1, p. 299.

(1) See the alteration in the law as to the effect of an attainder for felony, by stats. 54 Geo. 3, c. 145, and 4 & 5 Will. 4, c. 23, stated ante, p. 251, n.

(2) The statutes of recusancy are now repealed, ante, p. 257, n.

they endure, will with greater propriety be reserved as the object of our future inquiries [3].

II. For alienation contrary to law, as

II. Lands and tenements may be forfeited by *alienation*, or conveying them to another, contrary to law. This is either alienation in *mortmain*, alienation to an *alien*, or alienation by *particular tenants:* in the two former of which cases the forfeiture arises from the incapacity of the alienee to take, in the latter from the incapacity of the alienor to grant.

1. Alienation in mortmain.

1. Alienation in *mortmain, in mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations [b], and the religious houses themselves to be principally considered in forming the statutes of mortmain: in deducing the history of which statutes, it will be matter of curiosity to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments have pursued them through all their finesses: how new remedies were still the parents of new evasions: till the legislature at last, though with difficulty, hath obtained a decisive victory.

Licenses in mortmain.

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feodal restraints of alienation were worn away. Yet, in consequence of these it was always, and is still necessary [c], for corporations to have a licence in mortmain from the crown to enable them to purchase [4] lands; for as the king is the ultimate lord of every fee, he ought not,

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[b] See Vol. 1, p. 479.

[c] F. N. B. 121.

(3) Until the facts of the seisin and of the forfeiture are found by an inquisition on behalf of the crown, or, as it is phrased, until "office found," the land remains in the offender, and may be conveyed by him, subject to being divested upon the recording of the inquisition. (See 5 B. & Ad. 765).

(4) Or rather, to hold the lands; for the conveyance vested the inheritance in them without any license, subject only to the entry of the lord for the forfeiture. Co. Litt. 2. b. 10; Rep. 30.

unless by his own consent, to lose his privilege of escheats and other feodal profits, by the vesting of lands in tenants that can never be attainted or die. And such licences of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest [d] [5]. But, besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also, (upon the same feodal principles), for the alienation of the specific land. And if no such licence was obtained, the king or other lord might respectively enter on the land so aliened in mortmain as a forfeiture. The necessity of this licence from the crown was acknowledged by the constitutions of Clarendon [e], in respect of advowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations [f]. Yet, such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest and most considerable dotations of religious houses happened within less than two centuries after the conquest. And, (when a licence could not be obtained), their contrivance seems to have been this: that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender or escheat, the society entered into those lands in right of such their newly acquired signiory, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feodal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to

Evasions of the rule by the clergy.

[d] Selden, Jan. Angl. 1, 2, § 45.

[e] *Ecclesiae de feudo domini regis non possunt in perpetuum dari, absque assensu et consensione ipsius.* C. 2, *A.D.* 1164.

[f] See Vol. 1, p. 384.

(5) Mr. Hallam doubts whether there was any restraint on alienations in mortmain prior to Magna Charta. (Middle Ages, vol. 2, p. 321).

stagnate; and that the lords were curtailed of the fruits of their signiories, their escheats, wardships, reliefs and the like; and therefore in order to prevent this, it was ordained by the second of king Henry III.'s great charters [g], and afterwards by that printed in our common statute-books, that all such attempts should be void, and the land forfeited to the lord of the fee [h].

Further prohibitions.

But, as this prohibition extended only to religious *houses*, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies (who, Sir Edward Coke observes [i], in this were to be commended, that they ever had of their counsel the best learned men that they could get) found many means to creep out of this statute, by buying in lands that were *bona fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances. This produced the statute *de religiosis*, 7 Edw. I.; which provided that *no person*, religious or other whatsoever, should buy, or sell, or receive under pretence of a gift, or term of years, or any other title whatsoever, nor should, by any art or ingenuity, appropriate to himself any lands or tenements in mortmain: upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and in default of all of them, the king, might enter thereon as a forfeiture.

Statute *de religiosis*.

This seemed to be a sufficient security against all alienations in mortmain: but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant; who, by fraud and collusion, made no defence; and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they

Origin of common recoveries.

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[g] *A.D.* 1217, cap. 43, edit. Oxon.

[h] *Non licet alicui de caetero dare terram suam alicui domui religiosae, ita quod illam resumat tenendam de eadem domo; nec liceat alicui domui religiosae terram alicujus sic accipere, quod tradat illum ei a quo ipsam recepit tenendam: si quis autem de caetero terram suam domui religiosae sic dederit, ut super hoc convincatur, donum suum penitus cassetur, ut terra illa domino suo illius feodi incurratur.* Mag. Cart. 9 Hen. III. c. 36.

[i] 2 Inst. 75.

had the honour of inventing those fictitious adjudications of right, which are since become the great assurance of the kingdom, under the name of *common recoveries*. But upon this the statute of Westminster the second, 13 Edw. I. c. 32, enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter[k], in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers) in order to protect them from the feodal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this provident prince to prevent any future evasions, that when the statute of *quia emptores*, 18 Edw. I., abolished all sub-infeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord[l], a proviso was inserted[m] that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the King's licence by writ of *ad quod damnum* was marked out[6], by the statute 27 Edw. I. st. 2, it was farther provided by statute 34 Edw. I. st. 3, that no such licence should be effectual, without the consent of the mesne or intermediate lords.

Statute of Westminster 2nd.

Invention of uses.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use of* the religious houses; thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the seisin of the lands remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestuy que use* for the rents

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[k] Cap. 33. [l] 2 Inst. 501. [m] Cap. 3.

(6) Or rather, sanctioned; for it is mentioned in the statute itself as a thing accustomed.

and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new devise; for the statute 15 Ric. II. c. 5, enacts, that the lands which had been so purchased to uses should be amortised by licence from the crown, or else be sold to private persons; and that, for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of church-yards, such subtile imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And, lastly, as during the times of popery lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the reformation, the statute 23 Hen. VIII. c. 10, declares, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void [7].

Stat. 15 Rich. 2 against uses in mortmain.

Statute against superstitious uses, 23 Hen. 8, c. 10.

But, during all this time, it was in the power of the crown, by granting a licence of mortmain, to remit the forfeiture, so far as related to its own rights; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the statute 18 Edw. III. st. 3, c. 3. But, as doubts were conceived at the time of the revolution how far such licence was valid [n], since the king had no power to dispense with the statutes of mortmain by a clause of *non obstante* [o],

Power of the crown to grant licenses confirmed.

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[n] 2 Hawk. P. C. 391. [See Harg. Co. Litt. 99. a., n. (1)].
[o] Stat. 1 W. & M. st. 2, c. 2.

(7) See also 16 Rich. 2, c. 5; 37 Hen. 8, c. 4; 1 Edw. 6, c. 14; 1 Geo. 1, c. 55; 4 Rep. 104; Bac. Ab., *Charitable Use*, (D.); 2 Swanst. 487; 5 Myl. & Cr. 15; 1 Russ. 226; 2 Myl. & K. 684; 1 Jarm. Wills, 188.

which was the usual course, though it seems to have been unnecesary [p]: and as, by the gradual declension of mesne signiories through the long operation of the statute of *quia emptores*, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by the statute 7 & 8 W. III. c. 37, that the crown for the future at its own discretion may grant licences to aliene or take in mortmain, of whomsoever the tenements may be holden.

Stat. 7 & 8 Will. 3, c. 37.

Temporary suspension of the statutes of mortmain, by 1 & 2 P. & M. c. 8.

After the dissolution of monasteries under Henry VIII. though the policy of the next popish successor affected to grant a security to the possessors of abbey lands, yet, in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by the statute 1 & 2 P. & M. c. 8, and, during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any licence whatsoever. And, long afterwards, for a much better purpose, the augmentation of poor livings, it was enacted by the statute 17 Car. II. c. 3, that appropriators may annex the great tithes to the vicarages; and that all benefices under 100*l.* *per annum* may be augmented by the purchase of lands without licence of mortmain in either case [8], and the like provision hath been since made, in favour of the governors of Queen Anne's bounty [q]. It hath also been held [r], that the statute 23 Hen. VIII. before mentioned did not extend to any thing but *superstitious* uses; and that therefore a man may give lands for the maintenance of a school, an hospital or any other *charitable* uses [9]. But as it was apprehended, from recent experience,

Augmentation of poor livings.

Queen Anne's bounty.

Charitable uses.

[p] Co. Litt. 99.

[q] Stat. 2 & 3 Ann. c. 11. [43 G. 3, c. 107; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 20].

[r] 1 Rep. 24.

(8) This statute was repealed, and other provisions for the same objects made by the statute 1 & 2 Vict. c. 106, s. 15. See, also, 29 Car. 2, c. 8; 1 & 2 Will. 4, c. 45; 1 & 2 Vict. c. 107; 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 45; 5 & 6 Vict. c. 26.

(9) As to gifts of lands for schools, see 6 & 7 Will. 4, c. 70. As to the purchase and exchange of estates by incumbents, see 55 Geo. 3, c. 147; 56 Geo. 3, c. 52; 1 Geo. 4, c. 6; 6 Geo. 4, c. 8; 1 & 2 Vict. c. 23. As to gifts for building or repairing churches and houses of residence, see 43 Geo. 3, c. 108; 51 Geo. 3, c. 115; 52 Geo. 3, c. 161, s. 27; 58 Geo. 3, c. 45, s. 33; 1 & 2 Will. 4, c. 38; 1 & 2 Vict. c. 107, ss. 4, 6, 9; 3 & 4 Vict. c. 60.

that persons on their death-beds might make large and improvident dispositions even for these good purposes, and defeat the political ends of the statutes of mortmain; it is therefore enacted by the statute 9 Geo. II. c. 36, that no lands or tenements, or money to be laid out thereon,[10] shall be given for or charged with any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six months after its execution, (except stocks in the public funds, which may be transferred within six months previous to the donor's death), and unless such gift be made to take effect immediately, and be without power of revocation: and that all other gifts shall be void[11]. The two universities,

Devises to charitable uses prohibited. 9 Geo. 2, c. 36.

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(10) See 1 Jarm. Wills, 201.

(11) The act contains an exception in favour of bonâ fide conveyances and transfers for an adequate valuable consideration, paid down at the time. (See 9 Geo. 4, c. 85; 1 Gale & D. 551).

The term "charitable," in this and the other statutes of mortmain, has a more extensive signification than in common parlance. Charity, in its original sense, denotes all the good affections men ought to bear towards each other; in its more restricted and common sense, relief of the poor. In neither of these senses is it used by the statutes of mortmain. Lord Chancellor Camden defined charity to be a gift to a general public use, which extends to the poor as well as the rich, of which there are many instances in the statute 43 Eliz. c. 4, as for building bridges, &c. (Highmore on Mortmain, 60, 121, and cases there cited; 10 Ves. J. 528, 541; 1 Jarm. Wills, 192). See modern cases on this act, 6 Taunt. 359; 2 Marsh. 61; 3 M. & S. 407; 2 Bar. & A. 96, 710; 1 Meriv. 342; 2 Id. 161; 2 B. & Ad. 744; 2 M. & W. 882; 8 Scott, 93; 1 Scott, N. R. 505; 2 Keen, 680. Copyholds are within the act. (3 B. & A. 149).—[CHITTY.]

Lord Hardwicke has declared, since this last mortmain act, that "there is no restriction whatsoever upon any one from leaving a sum of money by will, or any other personal estate, to charitable uses; provided it be to be continued *as a personalty*, and the executors or trustees *are not obliged*, or under a *necessity*, of laying it out in land, by virtue of any direction of the testator for that purpose. (2 Burn. Ecc. L. 509, tit. *Mortmain*).

Money left to repair parsonage houses, or to build upon land already in mortmain, is held not to be within the statute. (1 Bro. 444; Ambl. 373, 651; 1 Mer. 327; 4 Russ. 342). But a legacy to the corporation of Queen Anne's bounty is void: as by the rules of the corporation it must be laid out in land. (1 Bro. 13).

By the 43 Geo. III. c. 107, the operation of the mortmain act upon the 2 & 3 Anne, c. 11, s. 4, is removed, and the powers given by that section are restored, so that every person is at liberty to give by deed enrolled, or by will, any real or personal property for the augmentation of Queen Anne's bounty. That statute enables the governors to exchange all the lands of an augmented living or cure, and also to

their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act[12]: but such exemption was granted

apply money in their hands to the procuring of a suitable residence for the minister.

And by the 43 Geo. 3, c. 108, in like manner any person may give by deed enrolled, or will, executed three months before his death, five acres of land, or personal property to the amount of 500*l.*, for the building or repair of any church or parsonage house. If more is given, it may be reduced to that limit by the Chancellor. But a glebe of fifty acres can be augmented by one acre only. The bequest of personalty to establish a school has been held to be good; as it was not necessary to purchase lands to give effect to the testator's design, for the master might teach in his own house or in the church. (4 T. R. 526).—[CHRISTIAN.]

It has been determined, that this statute extends to the devise of lands to trustees, to be sold and the produce of the sale converted to charitable uses. (Amb. 20; 1 Ves. 108; 2 Ves. 52; 2 Sim. & St. 595). Money secured on mortgage, on turnpike tolls, canal and railway shares, poor rates, and county rates, are likewise within the scope of the act. (Amb. 625; 2 Ves. 45; 4 Ves. 431, 542; 10 Ves. 41; 1 Russ. & M. 71; 2 Id. 344; 3 Myl. & K. 517). A conveyance, only bad in part, under the statute, is not wholly void, but may pass so much of the estate as is not demised in mortmain. (2 Marsh. 61).

"No disposition has been manifested by the courts to strain the rules of construction in favour of charity. Never, indeed, was the spirit of any legislative enactment more vigorously and zealously seconded by the judicature, than the stat. of the 9 Geo. 2. This is abundantly evident from the general tone of the adjudications; but the two points in which it is most strikingly displayed are, first, the holding a gift to charity of the proceeds of real estate to be absolutely void, instead of giving to the charity legatee the option to take it as money, according to the rule since adopted in the case of a similar gift to an alien; and secondly, the refusal of equity to marshal assets in favour of a charity, in conformity to its general principle; that principle being evidently founded on an anxiety to carry out, as far as possible, the intentions of testators. In this solitary case, the intention has been allowed to be subverted by a mere slip or omission of the testator, which the court had the power of easily correcting, by an arrangement of the funds." (1 Jarm. Wills, 211. See in the same work and page, some remarks on the policy of the existing law).

There are no provisions analogous to those of the stat. 9 Geo. 2, applicable to Ireland or any of the British colonies or dominions abroad. (See 2 Meriv. 164; 1 Moore, P. C. 175; 1 Phill. 192; 1 Con. & Laws. 89).

By the 1 & 2 Geo. 4, c. 92, any person or body politic or corporate, in whom any lands, tenements, or hereditaments are vested, subject to any trust for any charitable purpose, may grant or convey the same in exchange for any other lands, &c.

(12) See 1 Eden, 16; 3 Ves. 728. And exceptions have been made by various statutes in favour of other public charities; as the British Museum (5 Geo. 4, c. 39), Greenwich Hospital (10 Geo. 4, c. 25, s. 37), The Foundling Hospital (11 Geo. 2, c. 29), &c. (See Shelford on Mortmain and Charitable Uses, p. 49).

with this proviso, that no college shall be at liberty to purchase more advowsons than are equal in number to one moiety of the fellows or students upon the respective foundations [13].

2. Secondly, alienation *to an alien* is also a cause of forfeiture to the crown of the land so alienated; not only on account of his incapacity to hold them, which occasions him to be passed by in descents of land [s], but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property; as was observed in the preceding volume [t 14]. 2. Alienation to an alien.

3. Lastly, alienations *by particular tenants*, when they are greater than the law entitles them to make, and devest the remainder or reversion [v 15], are also forfeitures to him whose right is attacked thereby. As, if tenant for his own life alienes by feoffment or fine for the life of another, or in tail, or in fee [16]; these being estates, which either must 3. Tortious alienation by particular tenants.

[s] See pages 249, 250. [t] Book I. page 372. [v] Co. Litt. 251.

(13) By the 45 Geo. 3, c. 101, this part of the statute is repealed, so that these colleges may now hold any number of advowsons. But it is said that these statutes did not affect the old restraints of the mortmain laws, and that a license from the crown is still necessary, when a college purchases an advowson. Many colleges are provided with prospective licenses to purchase in mortmain to a specified extent, and they have in practice been considered sufficient. — [COLERIDGE.]

(14) An alien may be grantee in a deed, though his holding is precarious; for on office found the king shall have it by his prerogative. (Co. Litt. 2. b.; 5 Co. 52; 1 Leon. 47. As to copyhold, see 1 Mod. 17; All. 14).

(15) It is not necessary that the remainder or reversion should be devested in order to create a forfeiture; for where that is in the crown, or where the subject-matter is an incorporeal hereditament, a tortious alienation by the particular tenant (now impossible in the latter case, since the abolition of fines and recoveries) does not devest the remainder or reversion, and yet operates as a forfeiture. (Co. Litt. 251. b.; 9 Rep. 106). So, a fine by a tenant for years did not devest the reversion, and yet was a forfeiture. It may be added, that this head of forfeiture is exclusively concerned with legal estates. There can be no forfeiture of an equity by improper alienation. (Fearne, C. R. 321).

(16) Or by recovery, (1 Co. 14. b.; 7 Scott, 807), but not by lease and release, bargain and sale, &c., as no estate passes by these "innocent" conveyances, but what may legally pass. The alienation in fee by deed, by tenant for life, &c., of any thing which lies in grant, as an advowson, common, &c., does not amount to a forfeiture, (Co.

or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion [u]. For which there seem to be two reasons: First, because such alienation amounts to a renuntiation of the feodal connexion and dependence; it implies a refusal to perform the due renders
[275] and services to the lord of the fee, of which fealty is constantly one; and it tends in its consequence to defeat and devest the remainder or reversion expectant: as therefore that is put in jeopardy by such act of the particular tenant, it is but just, that, upon discovery, the particular estate should be forfeited and taken from him, who has shewn so manifest an inclination to make an improper use of it. The other reason is, because the particular tenant, by granting a larger estate than his own, has by his own act determined and put an entire end to his own original interest; and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. The same law which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold or of chattel interests; but if tenant in tail alienes in fee, this is no immediate forfeiture to the remainder-man, but a mere *discontinuance* (as it is called [w]) of the estate tail, which the issue may afterwards avoid by due course of law [x17]: for he in remainder or reversion hath only a very remote and barely possible interest therein, until the issue in tail is extinct. But, in case of such forfeitures by particular tenants, all legal estates by them before created, as, if tenant for twenty years grants a lease for fifteen, and all charges by him lawfully made on the lands, shall be good

Discontinuance by tenant in tail is no forfeiture.

[u] Litt. § 415. [w] See Book III. ch. 10. [x] Litt. § 595, 596, 597.

Litt. 251. b.; but a fine in fee of such an estate was a forfeiture. (Ibid.). See in general, as to this description of forfeiture, 1 Saund. 319 b, &c. Fines and recoveries having been abolished, the only tortious conveyance which is now possible, is by feoffment.

(17) The discontinuance formerly took away the assignee's right of entry; and therefore, the "due course of law" mentioned in the text was a real action. (4 B. & Ad. 283; 1 Nev. & M. 130). But a discontinuance has been deprived of that effect by the stat. 3 & 4 Will. 4, c. 27, s. 39; (ante, p. 266, n. (10)); and the remedy of the issue is now by entry.

and available in law [y]. For the law will not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he has granted a good and lawful estate, by his own act, to avoid it, and defeat the interest which he himself has created [18].

Forfeiture by disclaimer of tenure.

Equivalent, both in its nature and its consequences, to an illegal alienation by the particular tenant, is the civil crime of *disclaimer;* as, where a tenant who holds of any lord neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord [z], upon reasons most apparently feodal. And so likewise, if in any court of record the particular tenant does any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted him at the first infeodation, or takes upon himself those rights which belong only to tenants of a superior class [a]; if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like [b]; such behaviour amounts to a forfeiture of his particular estate [19].

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III. Forfeiture or lapse on neglect to present to a vacant church.

III. Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan. For, it being for the interest of religion, and the good of the public, that the church should be provided with an officiating

[y] Co. Litt. 233. [z] Finch, 270, 271. [a] Co. Litt. 251. [b] Ibid. 252.

(18) But where the forfeiture is occasioned by breach of condition, even implied, as, against waste, this is a more direct injury to the reversioner, and a sub-lessee shall not be protected. (Co. Litt. 202. a., 234. a.; Gilb. Ten. 201).

(19) If a tenant sets up a title hostile to his landlord, it is a forfeiture of his term; and it is the same if he assists another person to set up such a claim. (1 C., M. & R. 141. See 1 Per. & D. 636). A parol disclaimer by tenant for years is no forfeiture. (2 Per. & D. 396). If a tenant set his landlord at defiance, and do any act disclaiming to hold of him as tenant, as, for instance, if he attorn to some other person, no notice to quit will be necessary; for, in such case, although the wrongful operation of an attornment has been taken away, (11 Geo. 2, c. 19, s. 11), the landlord may treat him as a trespasser. (Buller's N. P. 96; Cowp. 622; 2 Sch. & Lefr. 73, 434).

As to the disclaimer of a grant or devise, see p. 309.

minister, the law has therefore given this right of lapse, in order to quicken the patron, who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. This right of lapse was first established about the time (though not by the authority [c]) of the council of Lateran [d], which was in the reign of our Henry the Second, when the bishops first began to exercise universally the right of institution to churches [e]. And therefore, where there is no right of institution, there is no right of lapse: so that no donative can lapse to the ordinary [f], unless it hath been augmented by the Queen's bounty [g]. But no right of lapse can accrue, when the original presentation is in the crown [h 20].

Lapse, after six months' default.

The term, in which the title to present by lapse accrues from the one to the other successively, is six *calendar* months [i], (following in this case the computation of the church, and not the usual one of the common law), and this
[277] exclusive of the day of the avoidance [k 21]. But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in [l]; for the forfeiture accrues by law, whenever the negligence has continued six months in the same person. And also if the bishop doth not collate his own clerk immediately to the living, and the patron presents, though after the six months are lapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk [m]. For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his

[c] 2 Roll. Abr. 363, pl. 10.
[d] Bracton, l. 4, tr. 2, c. 3.
[e] See page 23.
[f] Bro. Abr. tit. *Quar. imped.* Cro. Jac. 518.
[g] Stat. 1 Geo. I. st. 2, c. 10.
[h] Stat. 17 Edw. II. c. 8. 2 Inst. 273.
[i] 6 Rep. 62. Registr. 42.
[k] 2 Inst. 361.
[l] Gibs. Cod. 769.
[m] 2 Inst. 273.

(20) If a right of lapse accrues to the bishop, and he dies, or is translated before he avails himself of it, the right of presentation to the lapsed benefice does not pass to the king, like the vacant patronage of the fee, but to the guardian of the spiritualties. (Gibs. 770).—[CHRISTIAN.]

(21) The passage referred to by the Commentator does not support this position as to the exclusion of the day of avoidance. (See 15 Ves. 255).

turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop [n]. For he had no permanent right and interest in the advowson, as the patron hath, but merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the king, prerogative here intervenes and makes a difference; and the patron shall never recover his right till the king has satisfied his turn by presentation: for *nullum tempus occurrit regi* [o]. And therefore it may seem as if the church might continue void for ever unless the king shall be pleased to present, and a patron thereby be absolutely defeated of his advowson. But to prevent this inconvenience, the law has lodged a power in the patron's hands of as it were compelling the king to present. For, if during the delay of the crown, the patron himself presents, and his clerk is instituted, the king indeed by presenting another may turn out the patron's clerk; or, after induction, may remove him by *quare impedit:* but, if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath lost his right, which was only to the next or first presentation [p].

No lapse against the crown.

In case the benefice becomes void by death, or cession through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril; for these are matters of equal notoriety to the patron and ordinary: but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron; otherwise he can take no advantage by way of lapse [q 22]. Neither shall any lapse thereby accrue

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Patron bound to take notice of vacancy in most cases.

[n] 2 Roll. Abr. 368. [o] Dr. & St., D. 2, c. 36. Cro. Car. 355.
[p] 7 Rep. 28. Cro. Eliz. 44. [q] 4 Rep. 75. 2 Inst. 632.

(22) See the cases collected, Mirehouse on Advowsons, 162. The 44 Geo. 3, c. 43, enacts, that in case of avoidance or deprivation on account of nonage, &c. of incumbent, no title by lapse shall accrue till after six months notice thereof by ordinary to patron.—[CHITTY.]

to the metropolitan or to the king; for it is universally true, that neither the archbishop or the king shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and hath exceeded his time: for the first step or beginning faileth, *et quod non habet principium, non habet finem* [r]. If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned or notice given, he is stiled a disturber by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong [s]. Also, if the right of presentation be litigious or contested, and an action be brought against the bishop to try the title, no lapse shall incur till the question of right be decided [t] [23].

Disturbance by bishop.

IV. Forfeiture by simony.

IV. By *simony*, the right of presentation to a living is forfeited and vested *pro hac vice* in the crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders seems to approach nearer to his offence. It was by the canon law a very grievous crime: and is so much the more odious, because, as Sir Edward Coke observes [u], it is ever accompanied with perjury; for the presentee is sworn to have committed no simony. However, it was not an offence punishable in a criminal way at the common law [w]; it being thought sufficient to leave the clerk to ecclesiastical censures. But as
[279] these did not affect the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures, which the modern prevailing usage with regard to spiritual preferments calls aloud to be put in execution. I shall briefly consider them in this place, because they devest the corrupt patron of the right of presentation, and vest a new right in the crown.

[r] Co. Litt. 344, 345. [s] 2 Roll. Abr. 369. [t] Co. Litt. 344.
[u] 3 Inst. 156. [w] Moor, 564.

(23) So, pending a suit in Chancery for the specific performance of an agreement for the sale of the next presentation, the court will restrain the bishop from taking advantage of a lapse. (9 Sim. 326. See 2 Y. & C. N. C. 147).

By the statute 31 Eliz. c. 6, it is for avoiding of simony enacted, that if any patron for any corrupt consideration, by gift or promise [24], directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity, such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice: and the crown shall present to it for that turn only [x]. But if the presentee dies without being convicted of such simony in his life-time, it is enacted by stat. 1 W. & M. c. 16, that the simoniacal contract shall not prejudice any other innocent patron, on pretence of lapse to the crown, or otherwise. Also, by the statute 12 Ann. stat. 2, c. 12, if any person for money or profit shall procure, in his own name or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subjected to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

31 Eliz. c. 6.

12 Ann. st. 2, c. 12.

Upon these statutes many questions have arisen with regard to what is and what is not simony. And, among others, these points seem to be clearly settled: 1. That to purchase a presentation, the living being actually vacant, is open and notorious simony [y]: this being expressly in the face of the statute [25]. 2. That for a clerk to bargain for the

What constitutes simony.

[x] For other penalties inflicted by this statute, see Book IV. ch. 4.

[y] Cro. Eliz. 788. Moor, 914.

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(24) The words are, "Any person or persons;" therefore a presentation by a stranger usurping the right would also be void; but the rightful patron, and not the crown, would then be entitled to present. (Co. Litt. 120. a.).

(25) Lord Hardwicke was of opinion, that the sale of an advowson during a vacancy, is not within the Statute of Simony, as the sale of the next presentation is; but it is void by the common law. (Amb. 268. See p. 22, ante, n. 1).—[CHRISTIAN.] Void, that is, as to the next presentation; but good as to the advowson itself. (2 Wils. 174; 5 Taunt. 724. See Cr. El. 811; 7 B. & Cr. 113). It has been held, that where the church was full, but the incumbency voidable at the election of the patron, the sale of the advowson was good, and carried the right of immediate presentation. (6 Nev. & M. 686). But this decision was reversed in error, on the ground that, under the circumstances, the living was actually void as to the patron, though not so void as to incur a lapse before deprivation. (2 Nev. & P. 492).

next presentation, the incumbent being sick and about to die, was simony, even before the statute of queen Anne [z] [26]: and now, by that statute, to purchase, either in his own name, or another's, the next presentation, and be thereupon
[280] presented at any future time to the living, is direct and palpable simony. But, 3. It is held that for a father to purchase such a presentation, in order to provide for his son, is not simony: for the son is not concerned in the bargain, and the father is by nature bound to make a provision for him [a]. 4. That if a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation for that turn shall indeed devolve to the crown, as a punishment of the guilty patron; but the clerk, who is innocent, does not incur any disability or forfeiture [b]. 5. That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal [c], provided the patron or his relations be not benefited thereby [d]; for this is no corrupt consideration moving to the patron. 6. That bonds of resignation in case of non-residence or taking any other living, are not simoniacal [e]; there being no corrupt consideration herein, but such only as is for the good of the public. So also, bonds to resign when the patron's son comes to canonical age, are legal; upon the reason before given, that the father is bound to provide for his son [f]. 7. Lastly, general bonds to resign at the patron's request are held to be legal [g]: for they may possibly be given for one of the legal considerations before mentioned; and where there is a possibility that a transaction may be fair, the law will not suppose it iniquitous without proof [27].

[z] Hob. 165.
[a] Cro. Eliz. 686. Moor, 916.
[b] 3 Inst. 154. Cro. Jac. 385.
[c] Noy, 142.
[d] Stra. 534.
[e] Cro. Car. 180.
[f] Cro. Jac. 248, 274.
[g] Cro. Car. 180. Stra. 227.

(26) Where a contract was made for the sale of a next presentation, the parties at the time knowing the incumbent to be at the point of death, and expecting an immediate vacancy, the Court of King's Bench held that the contract was simoniacal, and the presentation, made in pursuance of it by the purchaser, void; although the clerk presented was not privy to the transaction, and the contract was not entered into with a view to the presentation of any particular person. (2 B. & Cr. 635). But this decision was reversed in the House of Lords, in accordance with an earlier authority. (3 Bligh, N. S. 123; 2 W. Bl. 1052).

(27) In the great case of *The Bishop of London* v. *Fytche*, it was deter-

But, if the party can prove the contract to have been a corrupt one, such proof will be admitted, in order to shew the

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mined by the House of Lords, that a general bond of resignation is simoniacal and illegal. The circumstances of that case were briefly these:—Mr. Ffytche, the patron, presented Mr. Eyre, his clerk, to the Bishop of London for institution. The bishop refused to admit the presentation, because Mr. Eyre had given a general bond of resignation; upon this, Mr. Ffytche brought a *quare impedit* against the bishop, to which the bishop pleaded, that the presentation was simoniacal and void, by reason of the bond of resignation; and to this plea Mr. Ffytche demurred. From a series of judicial decisions, the Court of Common Pleas thought themselves bound to determine in his favour; and that judgment was affirmed by the Court of King's Bench; but these judgments were afterwards reversed by the House of Lords. The principal question was this, viz. whether such a bond was a *reward*, *gift*, *profit*, or *benefit*, to the patron, under the 31 Eliz. c. 6: if it were so, the statute had declared the presentation to be simoniacal and void. Such a bond is so manifestly intended by the parties to be a *benefit* to the patron, that it is surprising that it should ever have been argued and decided that it was not a *benefit* within the meaning of the statute. Yet many learned men are dissatisfied with this determination of the Lords, and are of opinion that their judgment would be different, if the question were brought before them a second time. But it is generally understood that the Lords, from a regard to their dignity, and to preserve a consistency in their judgments, will never permit a question which they have once decided to be again debated in their house. (See 1 Bro. 286). With respect to the influence which the judgments of the inferior courts ought to have upon the House of Lords, the Editor conceives a distinction may be suggested between cases arising merely upon the common law, and cases which depend upon the construction of a statute. A series of decisions in the courts are the best evidence we can have of the common law; and the Lords cannot find any adequate authority to oppose to these decisions, or which would justify their reversal: but upon the construction of a statute, where we have no reason to suspect any variation from the original, they seem as fully competent to determine a question, after any number of decisions upon it in the courts below, as after the first; and the length of the series can operate no farther than as an object of general convenience.

In this view of the subject, it is not inconsistent to approve of the judgment of the Lords in the case of resignation bonds; and at the same time to condemn their judgment in the case of *Reeve* v. *Long*, (see p. 169, ante, n. (9)), where their humanity led them to relax the severity of the law. The case of *The Bishop of London* v. *Ffytche* is reported at length in Cunningham's Law of Simony, p. 52. [1 East, 487; 3 Doug. 142].—[CHRISTIAN.]

The doubt which remained after this decision, whether bonds to resign in favour of some designated individual were valid, was determined against the validity of such bonds, in the case of *Fletcher* v. *Lord Sondes*, (5 B. & Al. 835; 1 Bligh, N. S. 144), on the unanswerable ground that the resignation in pursuance of such a bond must necessarily be general, there being no power to compel the patron to present the designated individual.

This decision, however sound, was a surprise upon many individuals, who had acted on an understanding that the law was different; and to relieve such persons from the consequences of their inadvertence, the stat. 7 & 8 Geo. 4, c. 25, was passed, giving va-

bond simoniacal, and therefore void. Neither will the patron be suffered to make an ill use of such a general bond of resignation; as, by extorting a composition for tithes [28], procuring an annuity for his relation, or by demanding a resignation wantonly or without good cause, such as is approved by the law; as, for the benefit of his own son, or on account of non-residence, plurality of livings, or gross immorality in the incumbent [h 29].

[h] 1 Vern. 411. 1 Eq. Cas. Abr. 86, 87. Stra. 534.

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lidity to antecedent presentations made with a bonâ fide agreement for resignation when another person specially named should become qualified; and relieving the parties from all penalties; but avoiding every resignation pursuant to any such agreement, unless the person named should be presented within six months.

With a view prospectively to mitigate some of the hardships of the existing law, this retrospective act was followed by the 9 Geo. 4, c. 94, which gives validity to engagements for resignation of any spiritual office, being a benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intent that any one person whosoever, to be specially named and described therein, or one or two persons being either by blood or marriage an uncle, son, grandson, nephew, or grand-nephew of the patron, or of one of the patrons beneficially entitled, to be specially named and described therein, shall be presented, &c., to such spiritual office. But such engagement is to be void, unless entered into before the presentation, &c., of the party making it, and unless the instrument in which it is contained be within two months from its date deposited with the registrar of the diocese or peculiar jurisdiction wherein the benefice is situated; there to be open for inspection. (Sects. 1, 4).

Every resignation made in pursuance of any such engagement must refer to it, and state the name of the person for whose benefit it is made, and shall be void unless such person be presented, &c., within six months. (Sect. 5).

Where a father gave a bond to his son to secure an annuity until he should be in possession of a living of a certain value, and by a contemporaneous agreement, referring to the bond, the son undertook forthwith to enter into holy orders and to accept such living, Lord Eldon was strongly of opinion that such a transaction was illegal. "The policy of the ecclesiastical constitution of this country requires that a man should take orders without any reference whatsoever to considerations of this nature." (8 Ves. 51. See 1 Jac. & W. 280).

It has been decided, though with a difference of opinion, that a bond to resign a school or freehold office at the request of the patron is valid. (1 East, 391; 3 B. & P. 231).

(28) An agreement restraining the then curate from asserting his claim to small tithes, by due course of law, and furnishing evidence against his successors (it being doubtful whether he was entitled to the tithes, or a modus in lieu thereof, although he was to receive an annual sum, as a consideration for the same), was held to be simoniacal, and the presentation void. (7 East, 600).—[CHITTY.]

(29) Under the rule which disables a lessee from disputing his landlord's title, the defendant in an action by the

V. The next kind of forfeitures are those by *breach* or non-performance of a *condition* annexed to the estate, either expressly, by deed, at its original creation, or impliedly, by law, from a principle of natural reason. Both which we considered at large in a former chapter [i]. V. Forfeiture by breach of condition.

VI. I therefore now proceed to another species of forfeiture, viz. by *waste*. Waste, *vastum*, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail [k]. VI. Forfeiture for waste.

Waste is either *voluntary*, which is a crime of commission, as by pulling down a house; or it is *permissive*, which is a matter of omission only, as by suffering it to fall for want of necessary reparations [30]. Whatever does a lasting damage to the freehold or inheritance is waste [l]. Therefore removing wainscot, floors, or other things once fixed to the freehold of a house, is waste [m] [31]. If a house be de- Voluntary, or permissive. Injuries to houses, preserves, &c.

[i] See ch. 10, page 152. [k] Co. Litt. 53. [l] Hetl. 35. [m] 4 Rep. 64.

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incumbent for the use and occupation of his glebe, cannot give in evidence the simoniacal presentation of the plaintiff. (5 T. R. 4). But it may be given in evidence by a defendant who is sued for the tithes, (Hob. 168), unless the occupier has entered into an agreement for a composition for tithes. (2 Marsh. 38; 6 Taunt. 333; Younge, 308; 2 Ves. & B. 150).

(30) Thus it is waste to omit to repair sea or river walls or banks. (Vin. Ab., *Waste*, (D.); Co. Litt. 53. b.).

(31) As to the law of fixtures, see Amos & Ferrard on Fixtures, and 2 Smith's Leading Cases, p. 99. The general meaning of the word is, something fixed to the freehold; i. e. to the ground or to a building; and which is not a principal or essential part of that to which it is affixed. Thus, a barn erected on pattens and blocks of timber, lying on the ground, but not let into the earth, is not a fixture, (3 East, 53); but a brick building, the foundation of which is let into the ground, or, it seems, merely resting on the ground, is a fixture. (3 East, 39; 7 Car. & P. 328). It seems that local usage may be admitted, in a doubtful case, to explain the nature of a particular article, whether it is properly a fixture or not. (2 B. & Ald. 165). The questions as to the right to fixtures may be divided into three classes:—1, as between landlord and tenant; 2, as between the executors of a tenant for life, and the remainderman or reversioner; 3, as between the heir and executor of a tenant in fee.

1. Generally speaking, a lessee cannot remove any thing which he has fixed to the freehold. (Co. Litt. 53. a.). But there are several exceptions to this rule. Thus, fixtures erected for the mere purpose of ornament or convenience, such as looking-glasses screwed to the wainscot, marble chimney-pieces, stoves and grates fixed to the chimney by brickwork, pumps screwed

Fire.

stroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste: but otherwise, if the house be burnt by the carelessness or negligence of the lessee[32], though now by the statute 6 Ann. c. 31, no action[33] will lie against a tenant for an accident of this kind[34]. Waste may

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to the wall, cupboards supported by holdfasts, &c., are removable. (1 P. Wms. 94; 1 Atk. 477; 3 Id. 15; 4 B. & Cr. 686; 6 Bingh. 437; 4 J. B. Moore, 240; 5 Nev. & M. 372; Amos & Ferrard, 79). But there may be such a complete annexation to the freehold, as to deprive the tenant of his right to insist on the ornamental character of the thing, as in the case of a conservatory erected on a brick foundation, (J. B. Moore, 54), or a box border. (1 Nev. & M. 720). Another exception was made at a very early date in favour of fixtures erected for the purposes of trade, allowing not indeed buildings erected for the purpose of carrying on trade in, but machines and utensils of trade, such as furnaces, vats, engines, and even buildings merely accessory to these, such as engine-houses, &c., to be removed by the tenant who had erected them. (20 Hen. 7, fo. 13, pl. 24; 1 Salk. 368; 2 East, 88). Trees planted by a nursery-man for the purpose of selling again are removable as trade fixtures, so long as they remain of an age fit for transplanting. (*Wardell* v. *Usher*, 3 Scott, N. R. 508). But trees planted, or erections made, for agricultural purposes, do not come within the description of trade fixtures. (4 Taunt. 316; 3 East, 39). The tenant must remove such fixtures as are removable by him, during the term, or, at least, during his possession, for if he quit the possession without severing them, the law implies a gift to the reversioner. (1 Salk. 368; 1 B. & Ad. 394; 2 East, 88; 7 Mee. & W. 14).

2. 3. The right of the executors of a tenant for life to remove fixtures affixed by him, is said to be less extensive than that of an ordinary lessee; but the authorities do not indicate any principle to which this distinction can be referred, or by means of which to determine the application of the rule, that the heir is less favoured than the remainderman, and therefore, that the executors of tenant in fee-simple have even a more limited right in respect of fixtures, than those of a particular tenant. It is clear, however, that fixtures erected for the purposes of trade by a tenant for life, may be recovered by the executor. (3 Atk. 13; Amb. 113; 1 H. Bl. 26; 3 East, 53). And notwithstanding a decision by Lord Mansfield, (1 H. Bl. 259, n.), which has been treated, without much reason, as being opposed to this conclusion, it seems that the same right exists in the executor of a tenant in fee-simple against the heir. (See 3 Atk. 14; Amb. 114; 3 East, 54; 2 Cr. & M. 153; 1 Wms. Executors, 578).

(32) This seems not to have been so at the common law. "Fortuna ignis vel hujusmodi eventûs inopinanti omnes tenentes excusat." (Fleta, lib. 1, c. 12, s. 20; 5 Rep. 13).

(33) The action of waste is abolished, (3 & 4 Will. 4, c. 27, s. 36); but an action on the case in the nature of waste, which was given by the 13 Ed. 1, c. 24, and has been the usual form in modern times, may still be brought. (See 1 Nev. & M. 13; 1 Moore, 11; 5 Scott, 58).

(34) With a proviso, however, that the act shall not defeat any agreement between landlord and tenant. But if a lessee covenants to pay rent, and to

also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance [n]. Timber also is part of the inheritance [o] [35]. Such are oak, ash, and elm, in all places; and in some particular countries, by local custom, where other trees are generally used for building, they are for that reason considered as timber [36]; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste [p]. But underwood [37] the tenant may cut down at any seasonable time that he pleases [q]; and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions [r]. The conversion of land from one

Cutting or destroying timber, or

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changing the nature of land.

[n] Co. Litt. 53. [o] 4 Rep. 62. [p] Co. Litt. 53.
[q] 2 Roll. Abr. 817. [r] Co. Litt. 41.

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repair, with an express exception of casualties by fire, he may be obliged to pay rent during the whole term, though the premises are burnt down by accident, and never rebuilt by the lessor. (1 T. R. 310). Nor can he be relieved by a court of equity, (Anst. 687), unless perhaps the landlord has received the value of his premises by insuring. (Amb. 621. [Overruled, 18 Ves. 115; 1 Sim. 146.]) And if he covenants to repair generally, without any express exceptions, and the premises are burnt down, he is bound to rebuild them. (2 Com. 626; 6 T. R. 650).—[CHRISTIAN.]

(35) 2 Saund. 47 b, n. f.; Id. 259. If during the estate of a mere tenant for life, timber is severed either by accident or by wrong, it belongs to the first person who has a vested estate of inheritance. But where there are intermediate contingent estates of inheritance, and the timber is cut down by a combination between the tenant for life and the person who has the next vested estate of inheritance; or if the tenant for life has himself such estate and sells timber; in these cases, the Chancellor will order it to be preserved for him who has the first estate of inheritance under the settlement. (3 Cox's P. Wms. 266; 3 Woodd. 400).—[CHRISTIAN.]

(36) In the county of York, birch, being commonly used for building cottages, sheep-houses, &c., is timber, (Moore, 813); and willow has been held to be so in Hampshire. (Hob. 219; 1 Woodd. 330). Beech, horse-chestnut, lime, aspen, and walnut, are timber in some counties. (See 2 P. Wms. 605; 10 East, 446).

(37) The wood attains the properties and privileges of timber at twenty years' growth, and that whether it is timber by the general custom of the realm or by local custom. (10 East, 455; 22 Vin. Ab. 442, pl. 6, n.). But though the tenant may cut down underwood, yet if he suffer the young germens to be destroyed, or stub up the same, it is waste. (Co. Litt. 53. a.). Cutting of willows and other trees which are not timber is waste, if they stand in the defence and safeguard of the house, and so is the destroying of a quickset hedge. (Ib.). So the cutting of fruit trees in a garden or orchard is waste. (Ib.; Roll. Ab. 817).

species to another is waste. To convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture, into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste[s]. For, as Sir Edward Coke observes[t], it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable, and *e converso* [38]. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in its value[u]. To open the lands to search for mines of metal, coal, &c. is waste; for that is a detriment to the inheritance[v]: but, if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use[w]; for it is now become the mere annual profit of the land. These three are the general heads of waste, viz. in houses, in timber, and in land [39]. Though, as was before said, whatever else tends to the destruction or depreciating the value of the inheritance, is considered by the law as waste [40].

Opening mines.

Who may not commit waste.

Let us next see, who are liable to be punished forcommitting waste. And by the feodal law, feuds being originally granted for life only, we find that the rule was general for all vassals or feudatories; "*si vasallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur*[x]." But, in our antient common law, the rule was by no means so large; for not only he that was seised of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant save only in three persons; guardian in chivalry, tenant in dower, and tenant by

[s] Hob. 296. [t] 1 Inst. 53. [u] 1 Lev. 309. [v] 5 Rep. 12. [w] Hob. 295. [x] Wright, 44.

(38) See 5 M. & P. 658. It is doubtful, however, whether it is waste to change the character of the land from that in which the tenant finds it, unless the land has been anciently of that character. (6 Ves. 106. See 2 Roll. Ab. 814, 47; 3 Swanst. 661).

(39) There was a fourth head of waste, which is thus described by Coke: "Exile or destruction of villeins or tenants at will, or making them poor, when they were not when the tenant came in, whereby they depart from their tenures, is waste." (Co. Litt. 53. b.).

(40) Such as the destruction or removal of heir-looms. (1 Inst. 53 a; 2 Inst. 304).

the curtesy[y]; and not in tenant for life or years[z]. And the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and if he did not, it was his own default. But in favour of the owners of the inheritance, the statutes of Marlbridge 52 Hen. III. c. 23, and of Gloucester 6 Edw. I. c. 5, provided that the writ of waste shall not only lie against tenants by the law of England, (or curtesy), and those in dower, but against any farmer or other that holds in any manner for life or years. So that, for above five hundred years past, all tenants merely for life or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste, *absque impetitione vasti:* that is, with a provision or protection that no man shall *impetere,* or sue him for waste committed[41]. But tenant in

Statutes of Marlbridge and Gloucester.

[y] It was however a doubt whether waste was punishable at the common law in tenant by the curtesy. Regist. 72. Bro. Abr. tit. *Waste,* 88. 2 Inst. 301.

[z] 2 Inst. 299.

(41) A tenant for life without impeachment of waste, has as full power of cutting down timber, and of opening new mines for his own use, as if he had an estate of inheritance; and is in the same manner entitled to the timber, if severed by others. (1 T. R. 56; 5 Ves. 425; 2 Swanst. 149, n.; Harg. Co. Litt. 220). But although such a tenant for life may commit waste for his own benefit, yet he may be restrained by an injunction out of the Court of Chancery from making *spoil and destruction* upon the estate. This distinction was first introduced in the case of Lord Barnard, who was tenant for life without impeachment of waste, with remainder to his eldest son in tail; and having conceived a displeasure against his son, from motives of spleen, began to pull down the family mansion, Raby Castle; but he was restrained by the Chancellor, and ordered to repair it. (2 Vern. 738). Since that case, such a tenant has been restrained from cutting down avenues and ornamental timber in pleasure grounds, and also young trees not fit for timber; and also trees upon a common two miles distant from the mansion-house, which had been planted as an ornament to the estate. (1 Bro. 166; 3 Bro. 549; 6 Ves. 107; 16 Ves. 185; Jac. 71; 6 Sim. 497. See also 3 Woodd. 399 et seq., where this subject is fully and learnedly treated).—[CHRISTIAN.]

The notion upon which the doctrine of equitable waste is founded, is of great antiquity. In an ordinance of Philip Le Bel, in 1302, we find this prohibition: "Ne faient aucun gast, et s'il y a aucun arbre qui ait esté gardé pour sa beaulté ou pour sostentasion de maisons, q'il soit encore gardé."

tail after possibility of issue extinct is not impeachable for waste; because his estate was at its creation an estate of inheritance, and so not within the statutes[a]. Neither does an action of waste lie *for the debtor* against tenant by statute, recognizance, or *elegit*, because against them the debtor may set off the damages in account[b]: but it seems reasonable that it should lie *for the reversioner*, expectant on the determination of the debtor's own estate, or of these estates derived from the debtor[c].

Punishment for waste.

The punishment for waste committed was, by common law and the statute of Marlbridge, only single damages[d]; except in the case of a guardian, who also forfeited his wardship[e] by the provisions of the great charter[f]: but the statute of Gloucester directs, that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages, to him that hath the inheritance. The expression of the statute is, "he shall forfeit the *thing* which he hath wasted;" and it hath been determined that under these words the *place* is also included[g]. And if waste be done *sparsim*, or here and there, all over a wood, the whole wood shall be recovered; or if in several rooms of a house, the whole house shall be forfeited[h]; because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done only in one end of a wood, (or perhaps in one room of a house, if that can be conveniently separated from the rest), that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner[i].

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VII. Forfeiture of copyhold estates by breach of custom.

VII. A seventh species of forfeiture is that of *copyhold* estates, by *breach* of the *customs* of the manor. Copyhold estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, alienation, and waste: whereupon the lord may seize them without any presentment by the homage[k]; but also to peculiar forfeitures

[a] Co. Litt. 27. 2 Roll. Abr. 826, 828.
[b] Co. Litt. 54.
[c] F. N. B. 58.
[d] 2 Inst. 146.
[e] 2 Inst. 300.
[f] 9 Hen. III. c. 4.
[g] 2 Inst. 303.
[h] Co. Litt. 54.
[i] 2 Inst. 304.
[k] 2 Ventr. 38. Cro. Eliz. 499.

annexed to this species of tenure, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors. And we may observe that, as these tenements were originally holden by the lowest and most abject vassals, the marks of feodal dominion continue much the strongest upon this mode of property. Most of the offences which occasioned a resumption of the fief by the feodal law, and were denominated *feloniae, per quas vasallus amitteret feudum*[l], still continue to be causes of forfeiture in many of our modern copyholds. As, by subtraction of suit and service[m 42]; *si dominum deservire noluerit*[n]: by disclaiming to hold of the lord, or swearing himself not his copyholder[o]; *si dominum ejuravit, i. e. negavit se a domino feudum habere*[p]: by neglect to be admitted tenant within a year and a day[q]; *si per annum et diem cessaverit in petenda investitura*[r]: by contumacy in not appearing in court after three proclamations[s]; *si a domino ter citatus non comparuerit*[t]: or by refusing, when sworn of the homage, to present the truth according to his oath[u]; *si pares veritatem noverint, et dicant se nescire,* [285] *cum sciant*[w]. In these and a variety of other cases, which it is impossible here to enumerate, the forfeiture does not accrue to the lord till after the offences are presented by the homage, or jury of the lord's court baron[x]; *per laudamentum parium suorum*[y]: or as it is more fully expressed in another place[z], *nemo miles adimatur de possessione sui beneficii, nisi convicta culpa, quae sit laudanda*[a] *per judicium parium suorum*[43].

[l] Feud. l. 2, t. 26, in calc.
[m] 3 Leon. 108. Dyer, 211.
[n] Feud. l. 1, t. 21.
[o] Co. Copyh. § 57.
[p] Feud. l. 2, t. 34, & t. 26, § 3.
[q] Plowd. 372.
[r] Feud. l. 2, t. 24.
[s] 8 Rep. 99. Co. Copyh. § 57.
[t] Feud. l. 2, t. 22.
[u] Co. Copyh. § 57.
[w] Feud. l. 2, t. 58.
[x] Co. Copyh. § 58.
[y] Feud. l. 1, t. 21.
[z] Ibid. t. 22.
[a] i. e. *Arbitranda, definienda.* Du Fresne, IV. 79.

(42) Provision was made by the statute 9 Geo. 1, c. 29, for exempting infants and femes covert from forfeitures of their copyholds in certain cases. This was repealed by the 11 Geo. 4 & 1 Will. 4, c. 65, which after some provisions for the admittance of infant covert and lunatic heirs and devisees to copyholds, and for the payment of their fines, enacts, (sect. 9), that no infant, feme covert, or lunatic, shall forfeit any copyhold land for neglect or refusal to come into court, and to be admitted, or to pay any fine for admittance.

(43) It is rather singular that in

VIII. Forfeiture by bankruptcy.

VIII. The eighth and last method, whereby lands and tenements may become forfeited, is that of *bankruptcy*, or the act of becoming a bankrupt: which unfortunate person may, from the several descriptions given of him in our statute law, be thus defined: a trader, who secretes himself, or does certain other acts, tending to defraud his creditors.

Who shall be such a trader, or what acts are sufficient

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every instance in which Lord Coke on copyholds is cited in this paragraph, his authority is directly contradictory of the text. In his fifty-seventh chapter he divides forfeitures into those which operate *eo instante*, and those which must be presented; and then enumerates those of the former class. Under this he ranges, among many others, disclaimer, not appearing after three proclamations, and refusing, when sworn, to present the truth. In his fifty-eighth chapter he enumerates the second class, and under it places treason, felony, and alienation. It is observable also, that the references to Dyer, 211, and 8 Rep. 99, are not in point.

With respect to the subject of the paragraph, if presentment is *necessary* in any case, it should seem in reason that the necesity would exist rather in case of treason and felony, where the conviction and attainder might take place far from the residence of the lord, than in the case of disclaimer, &c., which must take place either in the lord's court, or in a suit to which he was party. Of the first he might reasonably be supposed to remain ignorant until his homage by presentment informed him; of the latter he could hardly avoid taking instant notice. But in fact the better opinion seems to be, that in no case is presentment legally necessary. In every instance the forfeiture is referable back to a supposed determination of the will, which the act being inconsistent with the tenancy demonstrates. If the lord is not aware of the act, it is the duty of the homagers to inform him; but the forfeiture exists in that case before the information given. As a matter of prudence, however, the lord will of course procure a presentment. (See Scriven on Copyholds, 511, in which the opinions of Ch. Baron Gilbert and Watkins are stated).—[COLERIDGE.]

Although presentment may not be necessary in case of forfeiture by felony, &c., yet some act (such as entry) must be done by the lord to vest the estate in himself. (Gilb. Ten. 247; 5 B. & A. 584). And this is a necessary consequence from the doctrine that the lord may, in any case, waive the forfeiture. (3 T. R. 171). And if he does not take advantage of the forfeiture within twenty years, he is barred by the Statute of Limitations. (Ib.; 3 & 4 Will. 4, c. 27, s. 3; 3 Myl. & K. 325).

Where the act which occasions the forfeiture destroys the copyholder's estate (as by fine or feoffment, which changes the possession), of course, the lord's entry is immaterial, because the tenant has not only forfeited, but abandoned his customary estate; but in all other cases, not only is entry necessary, but it must be by the lord in whose time the forfeiture accrued; (3 T. R. 173); except in the case of a seizure quousque to compel an heir to come and be admitted; in which case, because a new forfeiture accrues de die in diem, the lord's right to enter devolves upon his heir, devisee, or alienee. (1 B. & Ad. 736).

It may be added, that if A. surrender a copyhold to the use of B.; before B. is admitted, his attainder will occasion no forfeiture; but the attainder of B. will be a cause of forfeiture. (2 Wils. 13; 5 B. & Ad. 254).

to denominate him a bankrupt, with the several connected consequences resulting from that unhappy situation, will be better considered in a subsequent chapter; when we shall endeavour more fully to explain its nature, as it most immediately relates to personal goods and chattels. I shall only here observe the manner in which the property of lands and tenements are transferred, upon the supposition that the owner of them is clearly and indisputably a bankrupt, and that a commission of bankrupt is awarded and issued against him.

By the statute 13 Eliz. c. 7, the commissioners for that purpose, when a man is declared a bankrupt, shall have full power to dispose of all his lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; and all lands and tenements which were purchased by him jointly with his wife or children to his own use, (or such interest therein as he may lawfully part with), or purchased with any other person upon secret trust for his own use; and to cause them to be appraised to their full value, and to sell the same by deed indented and inrolled, or divide them proportionably among the creditors. This statute expressly included not only free, but customary and copyhold, lands; but did not extend to estates tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate, wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 Jac. 1, c. 19, enacts, that the commissioners shall be empowered to sell or convey, by deed indented and inrolled, any lands or tenements of the bankrupt, wherein he shall be seised of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issues in tail, remainder-men, and reversioners, whom the bankrupt himself might have barred by a common recovery, or other means; and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same as the bankrupt himself might have done, and after redemption to sell them.

Stat. 13 Eliz. c. 7.

[286]

Stat. 21 Jac. 1.

And also, by this and a former act [b], all fraudulent conveyances to defeat the intent of these statutes are declared void; but that no purchasor *bonâ fide*, for a good or valuable consideration, shall be affected by the bankrupt laws, unless the commission be sued forth within five years after the act of bankruptcy committed.

By virtue of these statutes a bankrupt may lose all his real estates; which may at once be transferred by his commissioners to their assignees, without his participation or consent [44].

[b] 1 Jac. I. c. 15.

(44) The provisions of the bankrupt law for the purpose of vesting the real and personal estate of bankrupts in their assignees have been simplified by modern statutes. Assignees are chosen by the majority in value of the creditors who have proved debts each to the amount of £10 at the least; and the assignees so chosen are *appointed* by the Court of Bankruptcy, and such appointment is evidenced by a certificate under the seal of the Court. Immediately upon the appointment, without any bargain and sale or other conveyance or act done, the real and personal estates of the bankrupt, and his rights of entry and action and powers of appointment (except actions for personal wrongs, estates tail, copyholds, advowsons, property, rights and powers vested in him as trustee, and certain offices and pensions which are not assignable) vest in his assignees for the benefit of his creditors generally; and in places where registration of conveyances is required, such certificate of appointment must be registered within two months. (Stats. 6 Geo. 4, c. 16; 1 & 2 Will. 4, c. 56, ss. 25, 26, &c.) As the bankrupt's leases for years may be onerous rather than profitable possessions, the acceptance of them is left to the option of the assignees; and if they accept them, or if they renounce them, and the bankrupt delivers up the lease (or, in case of a parol demise, possession, 3 Nev. & P. 390), he is discharged from all future liability under the covenants, &c. (6 Geo. 4, c. 16, s. 75; 5 Taunt. 800; 3 Moo. & P. 715; 2 B. & Ad. 716). And by the statute 3 & 4 Will. 4, c. 74, ss. 55 to 73, special provisions are made for the disposition of the bankrupt's estates tail in freeholds or copyholds. Other copyholds belonging to the bankrupt are to be sold by the commissioners for the benefit of the creditors, by inrolled indenture, authorizing some person or persons on their behalf to surrender the same for the purpose of the purchaser being admitted. (6 Geo. 4, c. 16, ss. 68, 69).

The statutory transfer operated retrospectively upon the beneficial interest (though not upon the legal estate, 2 M. & Sel. 446) in all property to which the bankrupt was entitled at the time of the commission of the act of bankruptcy; and this is still the general principle, but much controlled for the benefit of parties who, without notice of the act of bankruptcy in the meantime, have bonâ fide dealt with the bankrupt.

The stat. 6 Geo. 4, c. 16, s. 86, protects purchasers for valuable consideration from a bankrupt, *with notice* of the act of bankruptcy, unless the fiat issues within the year following the act of bankruptcy. By the sect. 81, con-

veyances by and contracts and other dealings and transactions by and with any bankrupt, bonâ fide made and entered into, and all executions and attachments against the lands or goods of the bankrupt, bonâ fide executed or levied more than two months before the fiat, were declared valid, notwithstanding any prior act of bankruptcy, if the party so dealing had no notice of any act of bankruptcy. Sect. 82 protects payments made by or to a bankrupt before the fiat, without notice, and not being a fraudulent preference; and sect. 84 protects parties delivering goods of the bankrupt without notice.

But sect. 108 enacts that no creditor having security for his debt, or having attached the goods of the bankrupt, shall receive more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt, before the bankruptcy. Provided that no creditor, though for a valuable consideration, shall avail himself of an execution upon any judgment by default, confession, or nil dicit.

It having been held that all executions, except on judgment after verdict, trial by the record, or on demurrer, were within this last proviso, (4 Moo. & P. 238), it was enacted by the 1 Will. 4, c. 7, s. 7, that no judgment signed, or execution issued on a cognovit signed, after declaration filed and delivered, or judgment by default, confession, or nil dicit, according to the practice of the Court, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, should be within that proviso. (1 Nev. & M. 668).

The stat. 2 & 3 Vict. c. 11, s. 12, gives validity to all *conveyances* by any bankrupt, bonâ fide made and executed before the fiat to persons without notice; but this particular provision has been superseded by the general enactment in the 2 & 3 Vict. c. 29, which recites the 6 Geo. 4, c. 16, s. 82, and the 2 & 3 Vict. c. 11, s. 12, and enacts, that all contracts, dealings and transactions by and with any bankrupt, bonâ fide made and entered into *before the fiat*, and all executions and attachments against his lands and goods, bonâ fide executed and levied *before the fiat*, not being a fraudulent preference, shall be valid, *notwithstanding any prior act of bankruptcy*, provided the party so dealing, &c. had no notice of any prior act of bankruptcy.

The date of the fiat is thus substituted for the two months before the fiat, in the 81st sect. of the Bankrupt Act; and bonâ fide dealings with a bankrupt, without notice of any act of bankruptcy, and before the fiat has actually issued, are now placed on the same footing as if no prior act of bankruptcy had been committed. But as, under the concluding proviso in the 108th section of the Bankrupt Act, executions under judgments upon warrants of attorney are not protected unless the goods are not only seized, but actually *sold* before the fiat, (being until then mere securities), so such executions are still unprotected; because it is the fiat, not any prior act of bankruptcy, which defeats them. (8 Mee. & W. 463; 10 Id. 22, 36). But executions on judgments obtained adversely, if levied by seizure before the fiat, are protected.

CHAPTER XIX.

OF TITLE BY ALIENATION.

THE most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense; under which may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another: whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.

Of title by alienation in general.

This means of taking estates by alienation is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feodal law [a], a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feodal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts; for, if he might, the feodal restraint of alienation would have been easily frustrated and evaded [b]. And, as he could not aliene it in his life-time, so neither could he by will defeat the succession, by devising his feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent or presumptive heir [c]. And therefore it was very usual in antient feoffments to express that the alienation was made by consent of the heirs of the feoffor; or sometimes for the heir apparent himself to join with the feoffor in the grant [d]. And, on the other hand, as the feodal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his

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[a] See pag. 57. [b] Feud. l. 1, t. 27. [c] Co. Litt. 94. Wright, 168.
[d] Madox, Formul. Angl. No. 316, 319, 427.

signiory without the consent of his vasal: for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprized of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle, by the lord of a neighbouring clan [e]. This consent of the vasal was expressed by what was called *attorning* [f], or professing to become the tenant of the new lord: which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchasor, and to become his tenant, the grant or contract was in most cases void, or at least incomplete [g]: which was also an additional clog upon alienations.

But by degrees this feodal severity is worn off [1]; and experience hath shewn, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of king Henry the First, which allowed a man to sell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power than over what had been transmitted to him in a course of descent from his ancestors [h]: a doctrine which is countenanced by the feodal [289] constitutions themselves [i]: but he was not allowed to sell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate [k]. Afterwards, a man seems to

[e] Gilb. Ten. 75.

[f] The same doctrine and the same denomination prevailed in Bretagne—*possessiones in jurisdictionalibus non aliter apprehendi posse, quam per attournances et avirances, ut loquisolent; cum vasallus, ejurato prioris domini obsequio et fide, novo se sacramento novo item domino acquirenti obstringebat; idque jussu auctoris.* D'Argentre Antiq. Consuet. Brit. apud Dufresne, i. 819, 820.

[g] Litt. § 551.

[h] *Emptiones vel acquisitiones suas det cui magis velit. Si bocland habeat quam ei parentes dederunt, non mittat eam extra cognationem suam.* LL. Hen. I. c. 70.

[i] Feud. l. 2, t. 39.

[k] *Si questum tantum habuerit is, qui*

(1) See 1 Eden, 191.

have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his *assigns* by name; but, if his *assigns* were not specified in the purchase deed, he was not empowered to aliene[l]: and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir[m]. By the great charter of Henry III.[n], no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one half or moiety of the land[o]. But these retrictions were in general removed by the statute of *quia emptores*[p], whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion[q]. And even these tenants *in capite* were by the statute 1 Edw. III. c. 12, permitted to aliene, on paying a fine to the king[r]. By the temporary statutes 7 Hen. VII. c. 3, and 3 Hen. VIII. c. 4, all persons attending the king in his wars were allowed to aliene their lands without licence, and were relieved from other feodal burdens. And lastly, these very fines for alienations were, in all cases of frechold tenure, entirely abolished by the statute 12 Car. II. c. 24. As to the power of *charging* lands with the debts of the owner, this was introduced so early as statute Westm. 2, which[s] subjected a *moiety* of the tenant's lands to executions, for debts recovered by law: as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*, made the same year, and in a statute staple by statute 27 Edw. III. c. 9, and in other similar recognizances by statute
[290] 23 Hen. VIII. c. 6. And now, the whole of them is not only subject to be *pawned* for the debts of the owner, but likewise to be absolutely *sold* for the benefit of trade and commerce by the several statutes of bankruptcy. The restraint of *devising* lands by will, except in some places by

partem terrae suae donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum haeredem exhaeredare. Glanvil, l. 7, c. 1.

[l] Mirr. c. 1, § 3. This is also borrowed from the feodal law. Feud. l. 2, t. 48.

[m] Mirr. ibid.

[n] 9 Hen. III. c. 32.

[o] Dalrymple of Feuds, 95.

[p] 18 Edw. I. c. 1.

[q] See pag. 72. 91.

[r] 2 Inst. 67.

[s] 13 Ed. I. c. 18.

particular custom, lasted longer; that not being totally removed, till the abolition of the military tenures. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till at last, they were made no longer necessary to complete the grant or conveyance, by statute 4 & 5 Ann. c. 16, nor shall, by statute 11 Geo. II. c. 19, the attornment of any tenant affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice [2].

(2) An attornment at the common law was an agreement of the tenant to the grant of the seignory or of a rent, or of the donee in tail or tenant for life or years to a grant of reversion or remainder, made to another. (Co. Litt. 309. a.) And the attornment was necessary to the perfection of the grant. However, the necessity of attornments was, in some measure, avoided by the Statute of Uses, (as by that statute the possession was immediately executed to the use, 1 T. R. 384, 386), and by the Statute of Wills, (by which the legal estate is immediately vested in the devisee), yet attornment continued after this to be necessary in many cases: but both the necessity and efficacy of attornments have been almost totally taken away by the statute 4 & 5 Anne, c. 16, ss. 9, 10, and 11 Geo. 2, c. 19, s. 11. By the former of those statutes, it was enacted, "that all grants or conveyances of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, without any attornment of the tenants of any such manors or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall be expectant or depending, as if their attornment had been had and made; provided that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee." By the latter statute it was enacted, "that the attornments of tenants to strangers claiming title to the estate of their landlords shall be absolutely null and void to all intents and purposes whatsoever; and that the possession of their respective landlord or landlords, lessor or lessors, shall not be deemed or construed to be in anywise changed, altered, or affected by any such attornment or attornments: provided that nothing herein contained shall extend to vacate or affect any attornment made pursuant to, and in consequence of, some judgment at law or decree or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee after the mortgage is become forfeited." The first statute having made attornment unnecessary, and the other having made it inoperative, it is now held not to be necessary, either to aver it in a declaration in covenant, or plead it in an avowry or other pleading whatever. (Doug. 283; see 1 Wms. Saund. 234 b, n. 4). Under the proviso in the first act, any notice to the tenant, of his original landlord having parted with his interest, is sufficient; and therefore the tenant's knowledge of the title of cestui que trust as purchaser has been held sufficient notice to entitle his trustees, as

In examining the nature of alienation, let us first inquire briefly, *who* may aliene, and to *whom;* and then, more

grantees of the reversion, to maintain an action of assumpsit for use and occupation against the tenant who had improperly paid over his rent to a vendor after such knowledge. (16 East, 99). Although the first-mentioned act renders an attornment unnecessary, yet it is still useful for a purchaser to obtain it, because after an attornment he would not, in any action against the tenant, be compelled to adduce full evidence of his title; (Peake, Evid. 266, 267); though the tenant would still be at liberty to shew that he had attorned by mistake. (6 Taunt. 202; see 6 Ad. & El. 675). —[CHITTY.]

"Though it may seem a parodox to modern ears, a feoffment to A. and his heirs did not pass a fee-simple originally in the sense we now use it, but only an estate to be enjoyed as a merum beneficium, without the power of alienation in prejudice of the heir or the lord ***. The heir took by *purchase*, and, independent of the ancestor, he could not alien; nor could the lord alien the seignory without the consent of the tenant: afterwards, the right of the lord gradually underwent several variations, which tended to diminish the interest of the heir and the lord, and to increase that of the tenant.

"The first variation was when the power of alienation, with leave of the lord, was introduced; then the heir no longer took independent of the ancestor, but what the ancestor pleased to leave him, and by *descent* from him. In Bracton's time, a doubt arose how the heir took; some thought he was co-enfeoffed with the ancestor, and that he took by purchase from the donor; others held (which opinion prevailed in Bracton's time) that he took by descent. This accounts for what is said in 2 Inst. 336, that a formedon in descender did not lie at common law of an estate tail, because the issue took by descent. But though he lays down the rule, he does not give the reason; therefore, if the ancestor aliened, the heir was defeated, and the effect to the lord was only in the chance of the escheat from the change of the tenant, viz. from grantee to alienee.

"The next step in favour of the tenant was to alien without license, for which purpose a larger grant was necessary, *i. e.* to him, his heirs, and *assigns*. This gave the standing right of alienations. (Bracton, l. 2, c. 6, s. 1, fol. 17). So, the tenant could alien, and change the escheat, and the lord was obliged to warrant such alienee. The only restriction on the tenant was, that he could not prejudice the lord by lessening the service reserved. (Bract. for. 23 b).

"The next privilege to the tenant was, that he might alien where the grant was only to him and his heirs. 2 Inst. 66 gives the reason that such tenant was not to be restrained from alienation. It was against the nature and purity of an estate enfeoffed at common law. This was in effect only a right of alienation sans notice.

"The next step affected the right of escheat, which was, not only to alien, but to charge and incumber the feud; and the lord was to take it subject to such incumbrances. (Wright, Ten. 117; Spelm. 21, 23; Bract. 382, s. 8). This power of incumbering was more prejudicial to the right of escheat than the power of alienation was: that only changed the chance, but by the incumbrances, more or less, the escheat was in proportion defeated; however, it was still only subject to the acts of the tenant.

"The lord's right was still further affected by acts of Parliament and judicial determinations, which subjected the land, not only to the acts of the tenant, but of the law on the tenant's account. Stat. Westm. 2 subjected the moiety of the tenant's land to elegit;

largely, *how* a man may aliene, or the several modes of conveyance.

I. Who may aliene, and to whom: or, in other words, who is capable of conveying and who of purchasing. And herein we must consider rather the incapacity, than capacity, of the several parties; for all persons in *possession* are *primâ facie* capable both of conveying, and purchasing, unless the law has laid them under any particular disabilities. But, if a man has only in him the *right* of either possession or property, he cannot convey it to any other, lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed [s] 3. Yet reversions and vested remainders may be

I. Who may aliene, and to whom.

Alienor must have an estate.

Reversioners and remainder-men.

[s] Co. Litt. 214.

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stats. Merchant and Staple (13 Ed. 1, and 27 Ed. 3) affected the whole feud for the tenant's debt, even in the hands of the heir. It became also subject to the dower of the wife." (Per Sir T. Clarke, M. R., 1 Eden, 191).

(3) It is a very ancient rule of law, that rights not reduced into possession should not be assignable to a stranger, on the ground that such alienation tended to increase maintenance and litigation, and afforded means to powerful men to purchase rights of action, and oppress others. (Co. Litt. 214. 265. a., n. 1; 232. b., n. 1). Our ancestors were so anxious to prevent alienation of *choses* or rights in action, that we find it enacted by the 32 Hen. 8, c. 9, (which it is said was in affirmance of the common law, Plowd. 88), that no person should buy or sell, or by any means obtain any right or title to any manors, lands, tenements, or hereditaments, unless the person contracting to sell, or his ancestor, or they by whom he or they claim the same, had been in *possession* of the same, or of the reversion or remainder thereof, for the space of one year before the contract; and this statute was adjudged to extend to the assignment of a copyhold estate, (4 Co. 26. a.), and of a chattel interest, or a lease for years, of land whereof the grantor was not in possession. (Plowd. 88). At what time this doctrine, which, it is said, had relation originally only to *landed* estates, (2 Woodd. 388), was first adjudged to be equally applicable to the assignment of a mere *personal* chattel not in possession, it is not easy to decide: it seems, however, to have been so settled at a very early period of our history, as the works of our oldest text writers, and the reports, contain numberless observations and cases on the subject. Lord Coke says (Co. Litt. 214. a.; see also 2 Bos. & Pul. 541), that it is one of the maxims of the common law, that no right of action can be transferred, "because, under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth."—[CHITTY.] Estates, contingent as to the person, were not formerly devisable, nor were rights of action or entry. (4 B. & Ad. 304). But now all rights of entry, and all contingent, executory, and future estates

granted; because the possession of the particular tenant is the possession of him in reversion or remainder; but *contingencies*, and mere *possibilities*, though they may be released or devised by will, or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some present interest[t].

Incapacity of traitors, felons, &c.

Persons attainted of treason, felony, and *praemunire*, are incapable of conveying, from the time of the offence committed, provided attainder follows[u]: for such conveyance by them may tend to defeat the king of his forfeiture, or the lord of his escheat. But they may *purchase* for the benefit of the crown, or the lord of the fee, though they are disabled to *hold:* the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat, as well as forfeiture, according to the nature of the crime[v 4].

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Corporations.

So also, corporations, religious or others, may purchase lands; yet, unless they have a licence to hold in mortmain, they cannot retain such purchase; but it shall be forfeited to the lord of the fee[w].

[t] Sheppard's Touchstone, 238, 239, 322; 11 Mod. 152; 1 P. Wms. 574; Stra. 132.

[u] Co. Litt. 42.

[v] Ibid. 2.

[w] Ibid. 2.

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and interests, may be devised. (Stat. 7 Will. 4 & 1 Vict. c. 26). Contingent and executory estates and interests may be released at law or in equity, and may be assigned in equity; but they are incapable of direct transfer at law, although, under the doctrine of estoppel, the effect of a legal transfer may, to a certain extent, be produced. That which one has by deed asserted, he is for ever estopped from denying; and if, therefore, a person who is not entitled to any vested estate in particular lands, by deed assert that he is so entitled, and affect to convey them; he, and all persons claiming under him, are for ever estopped from denying his title, or from asserting that the deed did not operate to convey it; so that, upon the happening of the contingency, the deed would be conclusive evidence of the purchaser's title, as against the vendor and those claiming under him. To the success of this contrivance, it is obviously necessary, that the grantor's want of a present vested estate should not appear on the deed itself, which would else contain internal evidence of its invalidity. (See 2 Sim. & St. 519; 10 B. & Cr. 181; 2 B. & Ad. 278; 3 Ad. & El. 12).

(4) After attainder the man is *civiliter mortuus*, all feudal relation between himself and his lord is at an end, and therefore there can be no escheat. Neither, strictly speaking, can there be forfeiture, which is a kind of punishment, and operates on the relation of king and subject. Indeed, by mere forfeiture in felony, the king's title would only be for a year and day. Lord Coke expresses himself therefore cautiously, calling it neither escheat, nor forfeiture; he says, "the king shall have it by his prerogative, and not the

Idiots and persons of nonsane memory[5], infants, and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void. The king, indeed, on behalf of an idiot, may avoid his grants or other acts[w]. But it hath been said, that a *non compos* himself, though he be afterwards brought to a right mind, shall not be permitted to allege his own insanity in order to avoid such grant: for that no man shall be allowed to stultify himself, or plead his own disability. The progress of this notion is somewhat curious. In the time of Edward I., *non compos* was a sufficient plea to avoid a man's own bond[x]: and there is a writ in the register[y] for the alienor himself to recover lands aliened by him during his insanity; *dum fuit non compos mentis suæ, ut dicit, &c.* But under Edward III. a scruple began to arise, whether a man should be permitted to *blemish* himself, by pleading his own insanity[z]: and, afterwards, a defendant in assise having pleaded a release by the plaintiff, since the last continuance, to which the plaintiff replied (*ore tenus*, as the manner then was) that he was out of his mind when he gave it, the court adjourned the assise; doubting whether, as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it[a]. Under Henry VI. this way of reasoning (that a man shall not be allowed to disable himself, by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument[b]; upon a question, whether the heir was barred of his right of entry by the feoffment of his insane ancestor. And from these

Idiots, &c.

Plea of non-competency.

[292]

[w] Co. Litt. 247.
[x] Britton, c. 28, fol. 66.
[y] Fol. 228. See also Memorand. Scacch. 22 Edw. 1, (prefixed to Maynard's Year-book, Edw. 2); fol. 23.
[z] 5 Edw. 3, 70.
[a] 35 Assis. pl. 10.
[b] 39 Hen. 6, 42.

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lord of the fee; for a man attainted hath no capacitie to purchase (being a man *civiliter mortuus*) but onely for the benefit of the king; no more than the alien né hath."—[COLERIDGE.]

(5) Persons born deaf, dumb, and blind, having always wanted the common inlets of understanding, are not distinguished by the law from born idiots. (Co. Litt. 42. b.; infra, p. 497).

loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason [c], the maxim that a man shall not stultify himself hath been handed down as settled law [d]: though later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain it [e] [6]. And, clearly, the next heir, or other person interested, may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant [f]. And so too, if he purchases under this disability, and does not afterwards, upon recovering his senses agree to the purchase, his heir may either waive or accept the estate at his option [g]. In like manner, an infant may waive such purchase or conveyance, when he comes to full age; or, if he does not then actually agree to it, his heirs may waive it after him [h] [7]. Persons also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress is ceased [i]. For all these are under the protection of the law; which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecility ceases. Yet the guardians or committees of a lunatic, by the statute of 11 Geo. 3, c. 20, are impowered

Infant.

Duress.

[c] F. N. B. 202.
[d] Litt. § 405; Cro. Eliz. 398; 4 Rep. 123; Jenk. 40.
[e] Com. 469; 3 Mod. 310, 311; 1 Equ. Cas. Abr. 279.
[f] Perkins, § 21.
[g] Co. Litt. 2.
[h] Ibid.
[i] 2 Inst. 483; 5 Rep. 119.

(6) In Cro. Eliz. 398, the opinion of Fitzherbert is denied to be law, and *de non sane memory* held to be a bad plea to an action of debt upon an obligation. See much learning respecting lunatics, collected in Mr. Fonblanque's edition of the Treatise of Equity, p. 40 et seq.—[CHRISTIAN]; and Collinson on Lunatics. The distinction appears to have been, that where the act done during insanity was only voidable (as a feoffment &c.), it was necessary to plead the special cause of avoidance, which, in the case of insanity, the rule did not allow; but where the deed &c. was absolutely void, there the party might have adduced evidence of his insanity under the general plea of non est factum. (4 Rep. 123; 5 Id. 119; Cro. El. 398; 3 Car. & P. 30; 5 B. & Cr. 170; 2 Sugd. Pow. 195). The new rules of pleading require a special plea in every case. (Reg. Gen. H. 4 Will. 4). In the Ecclesiastical Court, Lord Stowell annulled a marriage on the ground of the insanity of the husband, saying, "It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity." (1 Hagg. 414).

(7) This is shortly expressed by saying, that the acts of an infant are voidable, not void. (See Cro. Jac. 320; 1 W. Bl. 375; 3 Mau. & S. 481; 3 Taunt. 307).

to renew in his right, under the directions of the court of Chancery, any lease for lives or years, and apply the profits of such renewal for the benefit of such lunatic, his heirs or executors [8].

The case of a feme covert is somewhat different. She may *purchase* an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids it by some act declaring his dissent [k]. And, though he does nothing to avoid it, or even if he actually consents, the feme covert herself may, after the death of her husband, waive or disagree to the same: nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement [l]. But the *conveyance* or other contract of a feme covert (except by some matter of record) is absolutely void, and not merely voidable [m]; and therefore cannot be affirmed or made good by any subsequent agreement [9]. Feme covert. [293]

[k] Co. Litt. 3. [l] Ibid. [m] Perkins, § 154; 1 Sid. 120.

(8) Various provisions have been made by modern statutes for facilitating the management and letting of the estates of persons under any disability, such as lunacy, infancy, &c.; and by other statutes, the inconveniences which were occasioned by the vesting of trust estates in infants, lunatics, &c., have been considerably mitigated. (See stats. 7 Anne, c. 19; 2 Geo. 2, c. 10; 11 Geo. 3, c. 20; 43 Geo. 3, c. 75; 59 Geo. 3, c. 80; 6 Geo. 4, c. 74; 9 Geo. 4, c. 78; 11 Geo. 4 & 1 W. 4, cc. 47, 60, 65; 1 & 2 Vict. c. 69; 2 & 3 Vict. c. 60).

(9) The conveyance by matter of record (*i. e.* by fine or recovery) has been abolished; and a married woman is now enabled to dispose of any estate or interest in real estate, or in money subject to be laid out in the purchase of real estate, by a mere deed, to which the husband's consent is required; and which the wife must acknowledge her free consent to, upon an examination apart from her husband by a Judge, Master in Chancery, or Commissioner appointed for the purpose. (Stat. 3 & 4 Will. 4, c. 74, ss. 77, 78 et seq.). Copyholds belonging to a married woman have always, in the majority of manors, been disposable by a mere surrender by the husband and wife, the latter being examined apart, as to her free consent, by the lord or steward; and the practice in these cases is left unaltered by the act.

The legal or equitable title to real estate might always, under the Statute of Uses, or the Statute of Wills, or by the intervention of a trustee, have been placed at the disposition of a married woman by means of a power, *i. e.* by a conveyance or devise to such uses as she should appoint; and to such appointment no other formalities are requisite than such as are required by the terms of the power itself. A trust of real or personal property for the *separate use* of a married woman gives her, as to such property, the same powers of disposition in equity as she would have if she were not married. (4 Beav. 319).

Alien.

The case of an alien born is also peculiar. For he may purchase any thing; but after purchase he can *hold* nothing [10] except a lease for years of a house for convenience of merchandize, in case he be an alien friend [11]: all other pur-

(10) "If," says Lord Coke, (Co. Litt. 2; Com. Dig. *Aliens*, C. 2; see the reasons, Bac. Ab. *Aliens*, C.), "an alien *purchase* houses, lands, tenements, or hereditaments, to him and his heirs, albeit he can have no heirs, yet he is of capacity to *take* a fee-simple, but not to *hold*; for upon office found, that is, upon the inquest of a proper jury, the king shall have it by his prerogative of whomsoever the land is holden; and so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king." And if an alien purchase to him and the heirs of his body, he is tenant in tail; and if he suffer a recovery, and afterwards an office is found, the recovery is good to bar the remainder, (9 Co. 141; 2 Roll. 321; 4 Leon. 84; Com. Dig. *Aliens*, C. 2); but the estate purchased by an alien does not vest in the king till office found, until which time the alien is seised, and may sustain actions for injuries to the property. (5 Co. 52 b; 1 Leon. 47; 4 Leon. 82; Com. Dig. *Aliens*, C. 4). But though an alien may take real property by *purchase*, yet he cannot take by descent, by dower or by the curtesy of England, which are the acts of the law, for the act of law, says Sir Edward Coke, (7 Co. 25 a), giveth the alien nothing.—[CHITTY.]

(11) Formerly, no alien was permitted even to occupy a house for his habitation; and the alteration in that law was merely in favour of commerce and *merchants*. (See 1 Rapin, Hist. Eng. 361, n. 9; Bac. Ab. *Aliens*, C.). There is a diversity, says Sir Edward Coke, (Co. Litt. 2. b.), between a lease for years of a house for the habitation of a *merchant* stranger, being an alien, whose king is in league with ours, and a lease for years of lands, meadows, pastures, woods, and the like: for if he take a lease for years of *lands, meadows*, &c., upon office found, the king shall have it; but of a house for *habitation* he may take a lease for years, as incident to commerce, for without habitation he cannot merchandise or trade; but if he depart or relinquish the realm, the king shall have the lease, &c. (Co. Litt. 2. b.; Com. Dig. *Aliens*, C. 3; but in Toller, 12, it is said an alien may bequeath a lease). But there is a note in the margin of Dyer, 2 b; Com. Dig. *Aliens*, C. 3, which asserts that the alien does not forfeit his interest in the house to the king by going beyond sea, if there be servants residing in it during the time of his absence. If an alien die possessed of a lease for years of a house, neither his executors nor administrators shall have it, but the king, for he had it only for habitation as necessary to his *trade*, and not for the benefit of his executors or administrators. So, if the alien be *no merchant*, then the king shall have the lease for years, albeit it were for his habitation. (Co. Litt. 2. b.; 1 Roll. 194, 130; Com. Dig. *Aliens*, 3. C.; Bac. Ab. *Aliens*, C.). So that at this day no alien can hold a *lease* of any house, even for his habitation, unless he be engaged in mercantile pursuits, a strong proof of the peculiar partiality of the British law to commerce. But the indulgence which is thus shewn to alien merchants, is not extended to alien traders of a lower kind, *artificers* and *handicraftsmen*, for the 16th chapter of 32 Hen. 8. sect. 18, enacts, that all leases of any dwelling-house or shop within this realm, or any the king's dominions, made to any stranger, artificer, or handicraftsmen born out of

chases (when found by an inquest of office) being immediately forfeited to the king [n] [12].

Papists, lastly, and persons professing the popish religion, Papist.

[n] Co. Litt. 2.

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the king's obeisance, not being denizen, shall be void. But the British courts have construed this statute most strictly in favour of aliens, and have held that an *agreement* for the occupation of a house, not amounting to a lease, or a tenancy at will, may be supported by an artificer or handicraftsmen, though he be an alien. In the case of *Pilkington* v. *Peach*, (2 Shower, 135; 1 Saund. 8, n. 1), the court even took the pains to point out these methods of evasion in the following words: "There are ways to evade the statute; as, to make an agreement, for so long as you and I please, at the rate of 20*l.* per annum, and an action of assumpsit will lie thereon; or you shall have my house for so long as you and I please, for so much as it is worth." (And see 4 East, 103; 1 Saund. 6, 8; Com. Dig. *Aliens*, C. 7.)—[CHITTY.] It has however been since properly decided that an agreement for a tenancy by an alien artificer is as unlawful as an actual lease to him. (1 Per. & D. 629).

Doubts have sometimes arisen as to the precise description of persons who are meant by the statute 32 Hen. 8 to be included within the words *handicraftsmen or artificers*. There is a case upon this subject, (3 Mod. 94; Com. Dig. *Alien*, C. 7; Bac. Ab. *Aliens*, C.), in which the question was, whether a vintner was an artificer within the meaning of the act; and it was decided that he was not, but for a reason which may be considered as too special, and perhaps too ludicrous for a guide in future cases. The chief justice said, "This statute refers to another of 1 Rich. 2, c. 9, which prohibits alien artificers from exercising any handicraft in England, unless as a servant to a subject skilful in the same art, upon pain of forfeiting his goods; so that it is plain that those who used any art or manual occupation were restrained from using it here to the prejudice of the king's subjects; now the mystery of a vintner chiefly consists in mingling of wines, and that is not properly an *art* but a *cheat*." By the statute 22 Hen. 8, c. 13, it is enacted, that *bakers*, *brewers*, *surgeons*, and *scriveners*, shall not be considered as artificers or handicraftsmen.—[CHITTY.]

(12) But not before the inquest, (5 Co. 52 b), and if the purchase be made with the king's licence, there can be no forfeiture. (14 Hen. 4, 20; Harg. Co. Litt. 2. b., n. 2.)

Naturalization is an act of the legislature conferring on the alien and his issue all the rights of a natural-born subject, except those of filling certain offices and of taking grants from the crown, (12 & 13 Will. 3, c. 2; 1 Geo. 1, stat. 2, c. 4, s. 2); and enabling him to inherit to any of his ancestors, and to transmit lands to his children, being natural-born subjects, though born while he was an alien. (Co. Litt. 129. a. 8. a.; 2 Ves. sen. 286). Much, however, will depend upon the terms of the particular act; and where an alien was naturalized "from thenceforth," and enabled to retain &c. lands which he might or should have by purchase or gift, it was held that the title of a purchaser from the alien before naturalization was not confirmed. (2 Meriv. 431; but see 3 Myl. & K. 398). Denization by grant from the crown has no retrospective operation, unless it contains a clause confirming past purchases of land by the alien. (Id.).

and neglecting to take the oath prescribed by statute 18 Geo. III. c. 60, within the time limited for that purpose, are by statute 11 & 12 W. III. c. 4, disabled to purchase any lands, rents, or hereditaments; and all estates made to their use, or in trust for them, are void [o] [13].

II. Modes of alienation.

II. We are next, but principally, to inquire, *how* a man may aliene or convey; which will lead us to consider the several modes of conveyance.

In consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; which we have more than once observed, was that of occupancy or first possession. But this possession, when once
[294] gained, was also necessarily to be continued; or else, upon one man's dereliction of the thing he had seized, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose, therefore, of continuing the possession, the municipal law has established *descents* and *alienations:* the former to continue the possession in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in those persons to whom the proprietor, by his own *voluntary* act, shall choose to relinquish it in his life-time. A translation, or transfer, of property being thus admitted by law, it became necessary that this transfer should be properly evidenced: in order to prevent disputes, either about the fact, as whether there was any transfer at all: or concerning the persons, by whom and to whom it was transferred; or, with regard to the subject matter, as what the thing transferred consisted of; or lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made.

Common assurances.

The legal evidences of this translation of property are called

[o] 1 P. Wms. 354.

(13) See now, ante, p. 257, and stat. 2 & 3 Will. 4, c. 115, 2 Myl. & R. 23, 695.

the *common assurances* of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

These common assurances are of four kinds:—1. By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country; that is (according to the old common law) upon the very spot to be transferred. 2. By matter of *record*, or an assurance transacted only in the king's public courts of record. 3. By special *custom*, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death; and that is by *devise*, contained in his last will and testament. We shall treat of each in its order.

CHAPTER XX.

OF ALIENATION BY DEED.

In treating of deeds I shall consider, first, their general nature; and, next, the several sorts or kinds of deeds, with their respective incidents. And, in explaining the former, I shall examine, first, what a deed is; secondly, its requisites; and thirdly, how it may be avoided.

1. What is a deed.

I. First, then, a deed is a writing sealed and delivered by the parties[a]. It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called a deed, in Latin *factum*, κατ' εξοχην, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed[b][1]. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles *instar dentium*, like the teeth of a saw, but at present in a waving line) on the top or side, to tally or correspond with the other; which deed, so made, is called an indenture. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a strait or indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists[c]; and with us

Indenture.

[296]

[a] Co. Litt. 171. [b] Plowd. 434. [c] Lyndew. l. 1, t. 10, c. 1.

(1) As to estoppel, see 2 Smith's Leading Cases, 436, 460; and ante, p. 290, n. 3.

chirographa, or hand-writings[d]; the word *cirographum* or *cyrographum* being usually that which is divided in making the indenture: and this custom is still preserved in making out the indentures of a fine, whereof hereafter. But at length indenting only has come into use, without cutting through any letters at all; and it seems at present to serve for little other purpose than to give name to the species of the deed[2]. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original,* and the rest are *counterparts:* though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only is not indented, but *polled* or shaved quite even; and therefore called a *deed-poll,* or a single deed[e 3].

Original and counterpart.

Deed-poll.

[d] Mirror, c. 2. § 27.

[e] Ibid. Litt. § 371, 372.

(2) See Butl. Co. Litt. 229. a., n. Com. Dig. *Fait,* C. 1. A deed between several parties is now called an indenture, whether it be indented or not, and the actual indenting seems immaterial. The 5 Eliz. c. 4 required the binding of an apprentice to be by *indenture,* and under that act it was held necessary that the instrument should be actually indented, (2 Bott, 70, pl. 400; 1 Sess. Cas. 417); on which account the 31 Geo. 2, c. 11, was passed, expressly to declare that the apprentice should not be precluded from gaining a settlement in consequence of the instrument not being indented.—[CHITTY.] Some conveyances are expressly required to be by indenture, as bargains and sales of freehold estates, under the Stat. of Enrolments, 27 Hen. 8, c. 16, and leases, under the enabling statute, 32 Hen. 8, c. 28. It has been sometimes laid down that estoppel can only be by indenture; but this is a mistake. (2 B. & Ad. 278; 3 Nev. & M. 603). The most important distinction between an indenture and a deed-poll is, that the latter is considered to be made between the party or parties who execute it, on the one side, and all the world on the other, so that any person may take a right of action on a covenant contained in a deed-poll. But an indenture is made only between the persons named as parties to it: so that an indenture between A., B., and C., containing a covenant by A. with D., will give D. no right of action; although a covenant by a person who executes an indenture will bind him, notwithstanding he is not named as a party. But if the covenantee be named as a party, he may sue on the deed without having executed it. (2 Roll. Ab. 22 F., pl. 1; Carth. 66; 6 M. & Sel. 75; 5 B. & Cr. 355; 8 Sim. 123). So a stranger to an indenture cannot take a release or an estate under it, unless by way of remainder, or through the Statute of Uses. (3 M. & Sel. 308). But, as to a grant to a stranger, see 7 Mee. & W. 63; 2 Prest. Conv. 298; 3 Mau. & S. 323.

(3) Com. Dig. *Fait,* D. A deed-poll is not, strictly speaking, an agreement between two persons, but a declaration of some one particular person. Thus, a feoffment from A. to B. by deed-poll is not an agreement between A. and B., but rather a declara-

II. Requisites of a deed.
1. Parties and subject matter.

II. We are in the next place to consider the *requisites* of a deed. The first of which is, that there be persons able to contract and be contracted with, for the purposes intended by the deed: and also a thing or subject-matter to be contracted for; all which must be expressed by sufficient names[f]. So, as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.

2. Consideration.

Secondly, the deed must be founded upon good and sufficient *consideration*. Not upon an usurious contract[g]; nor upon fraud or collusion, either to deceive purchasors *bonâ fide*[h 4], or just and lawful creditors[i]; any of which bad

[f] Co. Litt. 35.
[g] Stat. 13 Eliz. c. 8.
[h] Stat. 27 Eliz. c. 4.
[i] Stat. 13 Eliz. c. 5.

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tion by A. addressed to all mankind, informing them that he thereby enfeoffs B. of certain lands therein mentioned. It was formerly called *charta de unâ parte*, and usually begins thus: *Sciant presentes et futuri quod ego* A. &c. &c. —Know all men by these presents, that I, *A.*, have granted and enfeoffed, &c. &c. Lit. § 370; Cruise Dig. title xxxii. s. 23.—[CHITTY.]

(4) That is to say, purchasers for valuable consideration, whether with or without notice of the prior conveyance.

Two statutes were passed in the reign of Elizabeth, for the protection, the one of *purchasers*, the other of *creditors*, against fraudulent dispositions of property. The stat. 27 Eliz. c. 4, (made perpetual by the 30 Eliz. c. 18), enacts that every conveyance, limitation, or charge of any lands, tenements, or other hereditaments, (including copyholds, 2 Nev. & M. 64), for the intent and purpose to defraud and deceive such persons as shall purchase the said lands, or any rent, profit, or commodity in or out of the same, shall be deemed and taken, *only* against such said persons and their representatives who shall so purchase for money or any good consideration, to be wholly void. This act has been held to avoid, in favour of subsequent purchasers for valuable or good consideration, (including mortgagees, and lessees at rack-rent, W. Bl. 1019), every prior conveyance of or charge upon lands made *voluntarily*, that is, without consideration; the mere absence of consideration, coupled with the subsequent sale, being held sufficient evidence of fraudulent intention, even though the prior voluntary conveyance is expressly communicated to the purchaser before he makes his bargain or pays his money. (Cowp. 260; 9 East, 59; 16 East, 212; 2 Nev. & M. 64). And where lands are limited to several persons in succession, if any of the limitations are made to persons, from whom or on whose behalf no consideration moves, such limitations are void as against subsequent purchasers for value. (6 Mau. & S. 60; 3 Nev. & P. 618). A conveyance in trust for the benefit of creditors is regarded as voluntary until it has been communicated to them; after which, on account of the effect which such communication may have upon their conduct, by inducing them to give time to their debtor, &c., it is considered to be supported by a good consideration. (2 Myl. & K. 495). The same statute makes void all absolute powers of revocation in

considerations will vacate the deed, and subject such persons, as put the same in ure, to forfeitures, and often to imprisonment. A deed also, or other grant, made without any consideration, is, as it were, of no effect: for it is construed to enure, or to be effectual, only to the use of the grantor himself[k5]. The consideration may be either a *good* [297]

[k] Perk. § 533.

conveyances, as against subsequent purchasers for value. If a party claiming under a voluntary conveyance convey the property to another for valuable consideration, this conveyance cannot be defeated by a subsequent conveyance for value by the original grantor.

The statute made for the protection of *creditors* (13 Eliz. c. 5, made perpetual by 29 Eliz. c. 5) applies to dispositions of personal, as well as of real estate. It enacts that every feoffment, &c., of lands, tenements, hereditaments, goods, and chattels, and every bond, suit, judgment, and execution, made with intent to delay, hinder, or defraud creditors or others of their just actions, debts, accounts, damages, &c., shall be, as against that person, his heirs, &c., whose actions, &c., are or might be disturbed, &c., utterly void; but with a saving of bonâ fide sales to purchasers without notice. The operation of this statute upon assignments of personal property is noticed in a subsequent chapter, (p. 441). It does not vacate in favour of creditors, a voluntary conveyance of real estate, unless, at the time of making the conveyance, the grantor was considerably indebted; although it has been held that a state of embarrassment, short of actual insolvency, may be sufficient to shew that the conveyance was fraudulent. (2 Beav. 340; but see 1 Cr. & Ph. 102). It seems that a purchaser for valuable consideration from the voluntary alienee, without notice, is entitled to hold the land against the claims of creditors insisting on the benefit of the statute. (9 Ves. 190; 1 Meriv. 638). Copyholds, and choses en action, which were formerly not liable to the claims of creditors, have been held not to be within this statute. (1 Cox, 278; 10 Ves. 360; 1 Cr. & Ph. 102). But now that choses en action subject to executions and copyholds are assimilated to freeholds in this respect, it may perhaps be thought that this construction should be abandoned. (See 4 Per. & D. 241).

(5) This is true only of a bargain and sale, which requires a consideration to raise a use in favour of the bargainee, and of a covenant to stand seised, in consideration of natural love and affection, which requires the existence of the relationship between the parties which is proper to raise that consideration. And, as is said in the text, where a conveyance is made to another person, and no consideration is expressed, or can be averred, then the use will generally result to the grantor; but this can scarcely be said to make the deed of no effect. On the contrary, with the exceptions above noticed, the essential distinction between a deed and an unsealed writing at law is, that the former will be good and binding, without any consideration; the latter will not. A promise by deed to pay money to another is binding without any consideration, (Plowd. 308 b), or even when a consideration is expressed and fails, unless it takes the shape of a condition, (2 Gale & D. 164); although a promise by writing unsealed, or by parol, is not binding, without consideration, being nudum pactum, ex quo non oritur actio. All contracts are, by the law of England,

or a *valuable* one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty; a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant[1]; and is therefore founded in motives of justice. Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favour of creditors, and *bonâ fide* purchasors.

3. Deed must be written or printed on paper or parchment.

Thirdly, the deed must be *written*, or I presume *printed*[6], for it may be in any character or any language; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed[m]. Wood or stone may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities: for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must also have the regular stamps imposed on it by the several statutes for the increase of the public revenue; else it cannot be given in evidence[7]. Formerly, many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the statute 29 Car. 2,

Stamps.

[1] 3 Rep. 83.

[m] Co. Litt. 229. F. N. B. 122.

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distinguished into agreements by specialty, and agreements by parol; the words written but not sealed, and words spoken. There is at the common law no such third class as contracts in writing, although, for particular contracts, writing is by statute required. If they be merely written, and not specialties, (*i. e.* under seal), they are parol, and a consideration must be proved. (7 T. R. 350; 3 Per. & D. 282).

The student should be aware, that, among the old writers, a "writing" is always understood to mean a deed, as "parol" means writing unsealed, as well as words spoken.

(6) Com. Dig. *Fait*, A. There seems no doubt that it may be printed, and that, if signatures be requisite, the name of a party in print at the foot of the instrument would suffice. (2 Bos. & P. 238; 2 M. & S. 288).—[CHITTY.]

(7) Stamps upon conveyances are now chiefly regulated by the stat. 55 Geo. 3, c. 184. The want of a stamp does not affect the validity of a deed, and the defect may, in most cases, be supplied at any time, on payment of a penalty; but as a deed which is not duly stamped cannot be given in evidence, it is in the meantime nearly as useless as if it were absolutely void.

c. 3, enacts, that no lease, estate or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only, (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value), shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid; unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized in writing.

Fourthly, the matter written must be *legally* and *orderly* set forth; that is, there must be words sufficient to specify the agreement and bind the parties; which sufficiency must be left to the courts of law to determine[n]. For it is not absolutely necessary in law, to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning[8]. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore I will here mention them in their usual[o] order.

4. The deed must explain itself.

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Formal parts of deeds.

1. The *premises* may be used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded[9]; and herein

1. Premises.

[n] Co. Litt. 225. [o] Ibid. 6.

(8) There are but few technical words used in deeds for which no equally efficacious equivalent or periphrasis can be found. The word "exchange" is essential to an exchange at common law; as the word "warrant" is to create a warranty, and as words of procreation are to create an estate tail by limitation or gift at common law; and these are almost the only instances in which an exact attention to technical phraseology is important even in common-law conveyances. (Vide infra, p. 379).

(9) As to the effect of the recitals upon the construction of the operative parts of the deed, see 5 Russ. 330. In addition to explaining the reasons upon which the transaction is founded, recitals in a deed or conveyance relating to the title to real estate serve the purpose of preserving a connected history of the title. Thus, if A., the owner of an estate, has sold it to B., and B. has sold it to C., from whom it has descended to his heir D., and from D. to his heir E., who sells it to F., the conveyance from B. to C. will contain a recital of the con-

also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted [p].

2. Habendum.

2, 3. Next come the *habendum* and *tenendum* [q]. The office of the *habendum* is properly to determine what estate or interest is granted by the deed: though this may be performed, and sometimes is performed, in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. As, if a grant be "to A. and the heirs of his body," in the premises, *habendum* "to him and his heirs for ever," or *vice versa;* here A. has an estate-tail, and a fee-simple expectant thereon [r]. But, had it been in the premises "to him and his heirs," *habendum* "to him for life," the *habendum* would be utterly void [s]; for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or devested by it [10].

3. Tenendum.

The *tenendum*, "and to hold," is now of very little

[p] See Appendix, No. II. § 2, p. v.
[q] Ibid.
[r] Co. Litt. 21. 2 Roll. Rep. 19, 23. Cro. Jac. 476.
[s] 2 Rep. 23. 8 Rep. 56.

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veyance by A.; and the conveyance to F. will contain a recital of the conveyance to C., and of the subsequent descents to E. and F., stating those circumstances of pedigree, &c., upon which the respective heirships depend. Upon reading the last deed of conveyance, therefore, one is informed of such facts material to the title as are not stated in any earlier deed, and obtains a reference to the prior documents, by the help of which the history may be traced further back.

(10) The habendum may enlarge or qualify the premises, but cannot abridge them or deprive any word in them of effect. (Co. Litt. 299. a.) There is a distinction, as to the effect of the habendum, between deeds in which the premises expressly mention an estate or interest, and those in which the premises merely describe the tenements, but do not mention any estate or interest: as, if no estate be mentioned in the premises, the grantor will take nothing under that part of the deed, except by implication and presumption of law; but if an habendum follow, the intention of the parties as to the estate to be conveyed will be found in the habendum, and consequently no implication or presumption of law can be made; and if the intention so expressed be contrary to the rules of law, (as to convey a freehold in futuro), the intention cannot take effect, and the deed will be void. On the other hand, if an estate and interest be mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without any habendum; and if an habendum follow, which is repugnant to the premises or contrary to the rules of law, and incapable of a construction consistent with both, the habendum shall be rejected, and the deed stand good upon the premises. (5 B. & Cr. 716). But if the premises mention a freehold estate, which the deed, for want

use, and is only kept in by custom. It was sometimes formerly used to signify the tenure by which the estate granted was to be holden; viz. "*tenendum per servitium militare, in burgagio, in libero socagio, &c.*" But, all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores*, 18 Edw. 1, it was also sometimes used to denote the lord of whom the land should be holden: but that statute directing all future purchasors to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* hath been also antiquated; though for a long time after we find it mentioned in antient charters, that the tenements shall be holden *de capitalibus dominis feodi*[t]; but, as this expressed nothing more than the statute had already provided for, it gradually grew out of use[11]. [299]

4. Next follow the terms of stipulation, if any, upon which the grant is made: the first of which is the *reddendum* or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted, as "rendering therefore yearly the sum of ten shillings, or a pepper corn, or two days' ploughing, or the like[u]." Under the pure feodal system, this render, *reditus*, return, or rent, consisted in chivalry principally of military services, in villenage, of the most slavish offices; and in socage, it usually consists of money, though it may still consist of services, or of any other certain profit[w]. To make a *reddendum* good, if it be of anything newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed[x]. But if it be of antient 4. Reddendum.

[t] Appendix, No. 1, Madox. Formul. passim.

[u] Appendix, No. II. § 1, p. iii.

[w] See p. 41.

[x] Plowd. 13. 8 Rep. 71.

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of some ceremony or circumstance, is incapable of passing, and the habendum limit an estate for years which may pass by the deed, there the habendum shall operate, although it abridges the premises. (2 Rep. 24 a; 1 East, 502; see 2 Saund. Us. 314, 4th ed.).

(11) The habendum, though a proper and formal part of a conveyance at common law, is not absolutely essential; and in a conveyance operating merely by way of declaration of use, as a bargain and sale, covenant to stand seised, or appointment, it is obviously unnecessary, and, (unless in a bargain and sale), improper. (See 5 B. & Ad. 783).

services or the like, annexed to the land, then the reservation may be to the lord of the fee [y] [12].

[y] Appendix, No. I. p. i.

(12) It is important to distinguish between an exception, a reservation, and a grant of a new hereditament by the grantee or lessee of the principal thing to his grantor or lessor. An exception finds its proper place in the premises or description of the parcels or thing granted, and serves to exclude from the grant some existing thing which would otherwise pass under the general description; so that it is properly a negative, (and, as such, implies no covenant on the part of the grantee or lessee not to use or occupy the thing excepted, Cro. El. 657), and may always be distinguished from a reservation or grant by its capability of being expressed by negative terms only. A grant of "all that close called A., except one acre thereof lying in such a position;" of "all that house in D., called &c., except the rooms thereof on the ground floor;" of "all that manor of D. with the appurtenances, except the advowson of S.," are instances of exceptions; and it is equally an exception, although it purports to be a reservation. Thus, a clause in a lease of lands, "reserving" all underwoods, is an exception, not a reservation. (4 Nev. & M. 824). If the exception extends to the whole thing granted, or would render entirely nugatory any one word or description of a class of things in the premises (as where the premises describe a house and shops, and the exception is of all shops), it is repugnant and void. (Cro. El. 6; Dyer, 264 b; 4 Scott, 444; 4 Taunt. 316).

"A reservation is always of a thing not in esse, but newly created or reserved out of the land or tenement demised." (Co. Litt. 476). "It must be of some *other* thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing." "If one grant land yielding for rent money, corn, a horse, spurs, a rose, or any such like thing, this is a good reservation; but if the reservation be of the grass or vesture of the land, or of a common or other profit to be taken out of the land, then these reservations are void." (Shep. Touch. 80). The reservations are void, that is to say, as such, so that no distress can be made (unless by express contract) to enforce the render of them; but, as exceptions, when not repugnant to the premises, or as independent grants by the lessee, they may be good.

It is difficult to collect from the authorities what is the distinction between a good reservation or rent, and a mere grant by the lessee. It has been laid down, that a reservation of money, a rose, a gilt spur, a pepper corn (things not necessarily the *produce* of the land), a heriot, suit of mill, or suit of court, is good as a reservation; but a reservation of a profit à prendre, as of the vesture of land, of common, &c., can only be good, if at all, as an exception, coupled or not, as the case may be, with a grant or license; as a reservation of a right of way, of hawking, fishing, or shooting, is also no reservation but a distinct grant by the lessee of those privileges. Perhaps the distinction may be thus stated:—An exception is of some actually existing part of the thing demised, including, therefore, grass, (which is part of the freehold), and excluding annual crops: a reservation is of something different from the thing demised, to be annually rendered or performed by the lessee, including, therefore, all tangible things to be delivered, and all active services to be performed by the tenant; while a privilege or right to be exercised by the

5. Another of the terms upon which a grant may be made is a *condition;* which is a clause of contingency, on the happening of which the estate granted may be defeated; as "provided always, that if the mortgagor shall pay the mortgagee 500*l.* upon such a day, the whole estate granted shall determine;" and the like [z]. 5. Conditions. [300]

6. Next may follow the clause of *warranty;* whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted [a]. By the feodal constitution, if the vasal's title to enjoy the feud was disputed, he might vouch, or call the lord or donor, to warrant or insure his gift; which if he failed to do, and the vasal was evicted, the lord was bound to give him another feud of equal value in recompense [b]. And so, by our antient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feodal verb *dedi,* to hold of himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered [c]. Or if a man and his ancestors had immemorially holden land of another and his ancestors by the service of homage, (which was called *homage auncestrel*), this also bound the lord to warranty [d]; the homage being an evidence of such a feodal grant. And, upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty [e], because they enjoy the equivalent. And so, even at this day, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent is payable) are bound to warrant the title [f]. But, in a feoffment in fee, by the verb *dedi,* since the statute of *quia emptores,* the feoffor only is bound to the implied warranty, and not his heirs [g]; because it is a mere personal 6. Warranty. Implied warranty.

[z] Appendix, No. II. § 2, p. viii.
[a] Ibid. No. I., p. i.
[b] Feud. l. 2, t. 8 & 25.
[c] Co. Litt. 384.
[d] Litt. § 143.
[e] Co. Litt. 174.
[f] Ibid. 384.
[g] Ibid.

lessee, and only to be suffered or permitted by the lessee, is not a rent or service reserved, but the mere fruit of a grant or covenant by the lessee. (See 4 Nev. & M. 824; 7 Mee. & W. 76).

contract on the part of the feoffor, the tenure (and of course the antient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that statute, no warranty whatsoever is implied[h]; they bearing no sort of analogy to the original feodal donation. And therefore in such cases it became necessary to add an express clause of warranty to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo* or *warrant*[i].

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Express warranty.

Origin of express warranties.

These express warranties were introduced, even prior to the statute of *quia emptores*, in order to evade the strictness of the feodal doctrine of non-alienation without the consent of the heir. For, though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet, if a clause of warranty was added to the ancestor's grant, this covenant descending upon the heir, insured the grantee; not so much by confirming his title, as by obliging such heir to yield him a recompense in lands of equal value: the law, in favour of alienations, supposing that no ancestor would wantonly disinherit his next of blood[k]; and therefore presuming that he had received a valuable consideration, either in land, or in money which had purchased land, and that this equivalent descended to the heir together with the ancestor's warranty. So that when either an ancestor, being the rightful tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right in fee-simple to one who was already in possession, and superadded a warranty to his deed, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the warrantee, but it also bound his heir: and this, whether that warranty was *lineal* or *collateral* to the title of the land. *Lineal* warranty was where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty: as where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger son[l]. *Collateral* warranty was where the heir's title to the land neither was,

Lineal warranty.

Collateral warranty.

[h] Co. Litt. 102.
[i] Litt. § 733.
[k] Co. Litt. 373.
[l] Litt. § 703, 706, 707.

nor could have been, derived from the warranting ancestor; as where a younger brother released to his father's disseisor, with warranty, this was collateral to the elder brother[m]. But where the very conveyance, to which the warranty was annexed, immediately followed a disseisin, or operated itself as such, (as, where a father, tenant for years, with remainder to his son in fee, aliened in fee-simple with warranty), this, being in its original manifestly founded on the *tort* or wrong of the warrantor himself, was called a warranty *commencing by disseisin;* and, being too palpably injurious to be supported, was not binding upon any heir of such tortious warrantor[n].

Effect of warranty.

In both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent from the warranting ancestor[o]. But though, without assets, he was not bound to insure the title of *another*, yet, in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land *himself;* for, if he could succeed in such claim, he would then gain assets by descent (if he had them not before) and must fulfil the warranty of his ancestor: and the same rule[p] was with less justice adopted also in respect of collateral warranties, which likewise (though no assets descended) barred the heir of the warrantor from claiming the land by any collateral title; upon the presumption of law that he might hereafter have assets by descent either from or through the same ancestor. The inconvenience of this latter branch of the rule was felt very early, when tenants by the curtesy took upon them to aliene their lands with warranty; which collateral warranty of the father descending upon his son (who was the heir of both his parents) barred him from claiming his maternal inheritance: to remedy which the statute of Gloucester, 6 Edw. 1, c. 3, declared, that such warranty should be no bar to the son, unless assets descended from the father. It was afterwards attempted in 50 Edw. 3, to make the same provision universal, by enacting that no collateral warranty should be a bar, unless where assets descended from the same

Restrained by statutes.

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[m] Litt. § 705, 707.
[n] Ibid. § 698, 702.
[o] Co. Litt. 102.
[p] Litt. § 711, 712.

ancestor [q]; but it then proceeded not to effect. However, by the statute 11 Hen. 7, c. 20, notwithstanding any alienation with warranty by tenant in dower, the heir of the husband is not barred, though he be also heir to the wife. And by statute 4 & 5 Ann. c. 16, all warranties by any tenant for life shall be void against those in remainder or reversion; and all collateral warranties by any ancestor who has no estate of inheritance in possession shall be void against his heir. By the wording of which last statute it should seem, that the legislature meant to allow, that the collateral warranty of tenant in tail in possession, descending (though without assets) upon a remainder-man or reversioner, should still bar the remainder or reversion. For though the judges, in expounding the statute *de donis*, held that, by analogy to the statute of Gloucester, a lineal warranty by the tenant in tail without assets should not bar the issue in tail, yet they held such warranty with assets to be a sufficient bar [r]: which was therefore formerly mentioned [s] as one of the ways whereby an estate-tail might be destroyed; it being indeed nothing more in effect, than exchanging the lands entailed for others of equal value. They also held, that collateral warranty was not within the statute *de donis;* as that act was principally intended to prevent the tenant in tail from disinheriting his own issue: and therefore collateral warranty (though without assets) was allowed to be, as at common law, a sufficient bar of the estate-tail and all remainders and reversions expectant thereon [t]. And so it still continues to be, notwithstanding the statute of queen Anne, if made by tenant in tail in possession: who therefore may now, without the forms of a fine or recovery, in some cases make a good conveyance in fee-simple, by superadding a warranty to his grant; which, if accompanied with assets, bars his own issue, and without them bars such of his heirs as may be in remainder or reversion [13].

Stat. 11 Hen. 7, c. 20.

Stat. 4 & 5 Ann. c. 16.

[q] Co. Litt. 373.
[r] Litt. § 712. 2 Inst. 293.
[s] Page 116.
[t] Co. Litt. 374. 2 Inst. 335.

(13) On this subject, see Butl. Co. Litt. 365. a., 373. b.; 1 Cr. & J. 538. The effect of a warranty in tolling a right of entry was taken away by the stat. 3 & 4 Will. 4, c. 27, s. 29, (vide ante, p. 266, n. 10). Where the party warranted could not rely upon the operation of the warranty in tolling his

7. After warranty usually follow *covenants*, or conventions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus, the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like: the grantee may covenant to pay his rent, or keep the premises in repair, &c. [u] If the covenantor covenants for himself and his *heirs*, it is then a covenant real [14], and descends upon the heirs; who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his *executors* and *administrators*, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty. It is also in some respects a less security, and therefore more beneficial to the grantor; who usually *covenants* only for the acts of himself and his ancestors, whereas a general *warranty* extends to all mankind. For which reasons the covenant has in modern practice totally superseded the other.

7. Covenants.

Covenant real.

8. Lastly, comes the *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day

8. The conclusion.

[u] Appendix, No. II. § 2, p. viii.

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adversary's right of entry, his only remedy, if the true owner had brought a real action, (not being an assize or in the nature of an assize), was to vouch the person bound by the warranty to defend his title, and, in case of eviction, to make him a recompense in value. If he were impleaded in an assize, or upon a writ of entry in the nature of an assize, voucher being impossible, he was entitled to a writ of warrantia chartæ against the person bound by the warranty. (Fitzh. 4 B., 134 E.) This writ, as well as voucher, has fallen in the general abolition of real actions, (3 & 4 Will. 4, c. 27, s. 36; ante, p. 266, n. 10), so that a warranty of real estate seems to be now entirely inoperative.

(14) A covenant is usually said to be real, in a different sense. "A covenant real is that whereby a man doth bind himself to pass a real thing, as lands or tenements; as a covenant to levy a fine of lands, in which case the land itself is to be recovered; or where it doth run in the realty so with the land that he that hath the one is subject to the latter; and so a warranty is called a real covenant." (Shepp. Touch. 161). As to the cases in which the benefits and obligations respectively of covenants run with the land, (a branch of the law which is in an unsettled state), see 1 Smith's Leading Cases, p. 27; and the Third Real Property Report, p. 44 et seq.

and year before mentioned[w]. Not but a deed is good, although it mention no date[15]: or hath a false date; or even if it hath an impossible date, as the thirtieth of February; provided the real day of its being dated or given, that is delivered, can be proved[x 16].

Deed must be read on request.

I proceed now to the *fifth* requisite for making a good deed; the *reading* of it. This is necessary, wherever any of the parties desire it[17]; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself: if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is mis-recited: unless it be agreed by collusion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party[y].

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Sealing and signing.

Sixthly, it is requisite that the party, whose deed it is, should *seal*, and now in most cases, I apprehend should *sign* it also[18]. The use of seals, as a mark of authenticity to

[w] Appendix, No. II. § 2, p. xii. [x] Co. Litt. 46. Dyer, 28.
[y] 2 Rep. 3, 9. 11 Rep. 27.

(15) The date of a deed is not essential. (Com. Dig. *Fait*, B. 3). In ancient times the date of the deed was generally omitted, and the reason was this, viz. that the time of prescription frequently changed, and a deed dated before the time of prescription was not pleadable, but a deed without date might be alleged to be made within the time of prescription. Dates began to be added in the reigns of Edw. 2 and Edw. 3.—[CHRISTIAN.]

(16) A person may declare in covenant that the deed was indented, made, and concluded on a day subsequent to the day on which the deed itself is stated on the face of it to have been indented, made, and concluded. (4 East, 477). And where there is no date, or an impossible date to a deed, and it directs something to be done within a certain time after its supposed date, the time will be calculated from the delivery. (2 Ld. Raym. 1076; 4 B. & Cr. 908; and see Bac. Ab. *Leases*, I. 1; Com. Dig. *Fait*, B. 3).—[CHITTY.]

(17) But this is not necessary, even in the case of an illiterate person, unless he desire it to be done. (1 Nev. & M. 578; 4 B. & Ad. 647; see 8 Car. & P. 124).

(18) Signing is certainly unnecessary in all cases where it is not required by some statute, or the words of the power or authority under which the deed may be executed. (17 Ves. 459). A person, unable to write, may, in all cases, make a valid signature by a mark, or by the hand of a third person signing in his presence and by his direction. (8 Ves. 185, 504; 1 Nev. & M. 576; 3 Nev. & P. 228. See 2 Gale & D. 769). An execution in this manner is different from an execution, in the absence of the party, by attorney. An attorney can only bind his principal by deed where he has himself been appointed by deed. (5 B. & Cr. 355). If a seal is attached to a deed before delivery, the delivery of the deed by the party himself is a sufficient recognition of the sealing, to give effect to it as his deed.

letters and other instruments in writing, is extremely antient. We read of it among the Jews and Persians in the earliest and most sacred records of history [z]. And in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase [a]. In the civil law also [b], seals were the evidence of truth; and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use in England. For though Sir Edward Coke [c] relies on an instance of king Edwin's making use of a seal about an hundred years before the conquest, yet it does not follow that this was the usage among the whole nation: and perhaps the charter he mentions may be of doubtful authority, from this very circumstance, of being sealed; since we are assured by all our antient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross: which custom our illiterate vulgar do, for the most part, to this day keep up; by signing a cross for their mark, when unable to write their names. And indeed, this inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters [d]. In like manner, and for the same unsurmountable reason, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice [306] of sealing only, without writing their names: which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster-abbey, himself

[z] 1 Kings, c. 21. Daniel, c. 6. Esther, c. 8.

[a] "And I bought the field of Hanameel, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it, and took witnesses, and weighed him the money in the balances. And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open." c. 32.

[b] Inst. 2, 10, 2 & 3.

[c] 1 Inst. 7.

[d] "*Propria manu pro ignorantiâ literarum signum sanctæ crucis expressi et subscripsi.*" Seld. Jan. Angl. l. 1, s. 42. And this, (according to Procopius), the emperor Justin in the east, and Theodoric king of the Goths in Italy, had before authorized by their example, on account of their inability to write.

being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England[e]. At the conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross[f]. And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals[g]. The impressions of these seals were sometimes a knight on horseback, sometimes other devices: but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the first, who brought them from the croisade in the holy land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained[18].

Signing not essential to a deed as such.

This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books, that sealing alone was sufficient to authenticate a deed: and so the common form of attesting deeds,—"*sealed* and delivered," continues to this day; notwithstanding the statute 29 Car. II. c. 3, before mentioned, revives the Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds: in which therefore signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other[h 19].

[e] Lamb. Archeion. 51.

[f] "*Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Anglia firmari solitam, in caeram impressam mutant, modumque scribendi Anglicum rejiciunt.*" Ingulph.

[g] Stat. Exon. 14 Ed. I.

[h] 3 Lev. 1. Stra. 764.

(18) One piece of wax may serve as a seal for several persons, if each of them impresses it himself, or one for all, by proper authority, or in the presence of all, and if it appear by the deed to be the seal of all. (Perk. ss. 130, 132, 134; 4 T. R. 313; 2 Gale & D. 162; see 6 Mau. & S. 319).

(19) A brief account of the important provisions of the celebrated statute here referred to (29 Car. 2, c. 3, "An Act for Prevention of Frauds and Perjuries") may not be out of place.

Sect. 1 enacts, "that all leases, estates of freehold, or terms of years, or any uncertain interest, of, in, to, or

A seventh requisite to a good deed is that it be *delivered*, by the party himself or his certain attorney: which therefore

Delivery of deed.

out of any lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases at will only."

It has generally been concluded that this enactment denies effect to a lease or conveyance by deed unsigned; but this has never been decided, and is not a necessary consequence from the words, which only include "leases, &c. made or created by livery and seisin only, or by parol, *and* not put into writing, and signed, &c." Now a lease or conveyance by deed is certainly not made by livery and seisin only, or by parol, and therefore comes no more within the words of the statute than it does within the description of the mischief intended to be prevented. (See Prest. Shepp. Touch. p. 57; 2 Gale & D. 163). But conveyances, assignments, and surrenders of *existing* estates come within the third section of the act, which is scarcely open to the construction here contended for. In all cases, the affixing of a corporate seal is a *signature* by such corporation. (1 You. & C. 518).

Sect. 2 excepts leases not exceeding three years from the making thereof, whereon a rent of two-thirds at least of the value is reserved.

Sect. 3. That no leases, estates, or interests of freehold for years, or any uncertain interest in lands, tenements, or hereditaments (except copyhold or customary lands), shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, &c., or his agent lawfully authorized in writing, or by act and operation of law.

Sect. 4 enacts, That no action shall be brought upon any special promise by an executor or administrator, to answer damages out of his own estate; or upon any special promise to answer for the debt, default, or miscarriage of another person; or upon any agreement upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interests in or concerning them; or upon any agreement that is not to be performed within one year from the making thereof; unless the agreement, on which such action shall be brought, or some note or memorandum thereof, shall be in writing, signed by the party to be charged, or by some person by him lawfully authorized (which authority, in this instance, may be without writing). (7 Scott, 769).

Upon this section, it seems to be settled, that a contract for the sale of landlord's fixtures, or of growing wood, underwood, or grass, is a contract for the sale of an interest in land; but that a contract for the sale of fixtures removable by the tenant or which go to the executor, or of growing crops in the nature of emblements, (such as potatoes, &c.), is not within this section. (6 East, 602; 1 You. & J. 396; 1 Cr., M. & R. 266; 5 B. & Cr. 829; 4 Mee. & W. 343). Parol agreements within this section, after being partly performed by one party with the concurrence of the other, will be enforced by a court of equity, notwithstanding the statute. (14 Ves. 387; 19 Id. 479; 1 Meriv. 7; 1 Swanst. 181). As to part execution at law, see 12 East, 513.

Sect. 7 enacts, That all declarations or executions of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party enabled to declare such trust.

Sect. 8 excepts trusts arising, trans-

is also expressed in the attestation; "sealed and *delivered.*" A deed takes effect only from this tradition or delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing[i], and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee: in which last case it is not delivered as a *deed,* but as an *escrow;* that is, as a scrowl or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes[j] [20].

Escrow.

[i] Perk. § 130. [j] Co. Litt. 36.

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ferred, or extinguished by act of law.

Sect. 9 requires all grants and assignments of trusts to be in writing, signed by the grantor or assignor.

Instances of implied trusts within the 8th sect., are, where an estate is purchased in the name of one person, but the money is given by another; and where, upon a conveyance or devise, a trust is declared as to part of the estate or interest, and nothing said as to the rest; what remains undisposed of results to the grantor or the devisor's heir. (2 Atk. 150).

Sect. 17 enacts, That no contract for the sale of any goods, wares, and merchandizes for the *price* of ten pounds sterling or upwards, shall be good, except the buyer accept part of the goods sold, or give something in earnest or part payment, or that some note or memorandum in writing of the bargain be signed by the parties or their agents. This clause is extended by the 9th Geo. 4, c. 14, s. 7, to all contracts for the sale of goods of the *value* of 10*l.* and upwards, notwithstanding such goods are to be delivered at some future time, or may not, at the time of the contract, be actually made, or ready for delivery.

The other sections of the Statute of Frauds do not relate to the subject now under consideration.

It may be remarked, in conclusion, that a valid consideration is essential to make a binding agreement by parol, or writing not under seal; and therefore that a memorandum, which states what one party is to do, without stating or disclosing the consideration or inducement to his doing it, is not a complete memorandum of the agreement. (1 Cr. & Jerv. 464; 1 Scott, 668; 5 Mee. & W. 621; see 9 Ves. 251).

(20) Com. Dig. *Fait,* A. 3 & B. 5. Delivery is absolutely necessary to a deed, for it is a mere instrument under seal, not a deed before delivery. But an instrument may operate, although it is never parted with by the grantor. (3 Meriv. 256; 5 B. & Cr. 671). And where a writing under hand and seal is sufficient to effectuate any object, such a writing, if not delivered, will be effectual, although not stamped as a deed within the Stamp Act. (1 East, 584). The delivery by the party of the instrument as his act and deed is

The *last* requisite to the validity of a deed is the *attestation*, or execution of it *in the presence of witnesses:* though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed[21]. Our modern deeds Attestation.

the formal declaration of his determination to complete the conveyance, or enter into the contract. (See Plowd. 308). "When a man passes a thing by deed, first, there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation; and afterwards he puts his seal to it, which is another part of deliberation; and, lastly, he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law, signifying fully his good will that the thing in the deed should pass from him to the other. So that there is great deliberation used in the making of deeds; for which reason they are received as a lien final to the party, and are adjudged to bind him without examining for what cause or consideration they were made." With regard to the delivery of a deed, no particular form or ceremony is necessary; it will be sufficient if a party testifies his intention in any manner, whether by action or word, to deliver or put it into the possession of the other party, as by throwing it down upon the table, with the intent that it may be taken up by the other party; or if a stranger deliver it with the assent of the party to the deed. (Phil. Ev. 449; 9 Rep. 137 a; Com. Dig. *Evidence*, (A. 3)). Proof that a party signed a deed which bears on the face of it a declaration that the deed was sealed by the party, is, when the testimony of a subscribing witness cannot be obtained, or when he has no recollection on the subject, evidence to be left to a jury that the party sealed and delivered the deed. (7 Taunt. 251; 2 Marsh. 527; and see 17 Ves. jun. 439; Peake, R. 146). It is a question of fact for the jury, upon the whole evidence, whether a bond was delivered as a deed to take effect from the moment of delivery, or at some future time. In *Murray* v. *Earl Stair*, Abbott, C. J., told the jury, that "to make the delivery conditional, it was not necessary that any express words should be used at the time; the conclusion was to be drawn from all the circumstances. It obviated all question as to the intention of the party, if at the time of delivery he expressly declared that he delivered it as an escrow, but that was not essential to make it an escrow." (2 Barn. & Cress. 88. See also 4 Barn. & Ald. 440; 5 Mau. & Selw. 223; 3 Per. & Dav. 499; 8 Car. & P. 124; 11 Mee. & W. 128).—[CHITTY.]

(21) It is not essential to the validity of a deed, in general, that it should be executed in the presence of a witness. (Com. Dig. *Fait*, B. 4; Phil. on Evid. 413 to 421, 4th ed.) And where the names of two fictitious persons had been subscribed by way of attestation, the judge permitted the plaintiff, who had received the deed from the defendant in that deceitful shape, to give evidence of the handwriting of the defendant himself; and where the subscribing witness denied any recollection of the execution, proof of his handwriting was deemed sufficient. (Peake, Rep. 23, 146; 2 Camp. 635. See 10 Ves. 436; 11 Mee. & W. 161).

The distinction between executions

are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feodal writers [k]; which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power), but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum; thus: "*hijs testibus, Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis* [l]." This, like all other solemn transactions, was originally done only *coram paribus* [m], and frequently when assembled in the court baron, hundred, or county-court; which was then expressed in the attestation, *teste comitatu, hundredo,* &c. [n]. Afterwards the attestation of other witnesses was allowed, the trial in case of a dispute being still reserved to the *pares;* with whom the witnesses (if more than one) were associated and joined in the verdict [o]: till that also was abrogated by the statute of York, 12 Edw. II. st. 1, c. 2. And in this manner, with some such clause of *hijs testibus,* are all old deeds and charters, particularly *magna carta,* witnessed. And in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner [p]. But in the king's common charters, writs, or letters patent, the stile is now altered: for at present the king is his own witness, and attests his letters patent thus: "*Teste meipso,* witness ourself at Westminster, &c.," a form which was introduced by Richard the

Ancient method of attestation.

[308]

Royal attestation.

[k] Feud. l. 1, t. 4.
[l] Co. Litt. 6.
[m] Feud. l. 2, t. 32.
[n] Spelm. Gloss. 228. Madox. Formul. No. 221. 322. 660.
[o] Co. Litt. 6.
[p] 2 Inst. 77.

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of deeds at common law, and executions under powers, is fully established. It is a well-known rule, that all the formalities and circumstances prescribed by a power are to be strictly observed. If a particular number of attesting witnesses is required, there must be that number. If they are to attest in a particular form, that form must be followed; and they must attest every thing that is necessary for the execution of the power. (4 Taunt. 214; 7 Taunt. 361; 17 Ves. 454; Sugden on Powers).—[CHITTY.]

first [q], but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijs testibus* entirely discontinued till the reign of Henry the eighth [r]: which was also the æra of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attestation, either at the bottom, or on the back of the deed [s] 22.

III. Deeds, how avoided.

III. We are next to consider, how a deed may be *avoided*, or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the essential requisites before-mentioned; either, 1. Proper parties 23, and a proper subject matter: 2. A good and sufficient consideration: 3. Writing on paper or parchment, duly stamped: 4. Sufficient and legal words, properly disposed: 5. Reading, if desired, before the execution: 6. Sealing; and, by the statute, in most cases signing also: or, 7. Delivery; it is a void deed *ab initio*. It may also be avoided by matter *ex post facto:* as, 1. By rasure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of the execution and attestation [t] 24. 2. By breaking off, or defacing the

Erasure or alteration.

Breaking the seal cancellation.

[q] Madox. Formul. No. 515.
[r] Ibid. Dissert. fol. 32.
[s] 2 Inst. 78. See page 378.
[t] 11 Rep. 27.

(22) From the few laconic deeds of antiquity, being mostly feoffments, which I have had an opportunity of seeing, I have observed that in the reign of Edw. IV., and before that time, they were subscribed neither by the parties nor the witnesses. But they conclude, *In cujus rei testimonium huic chartæ (vel scripto) nostra sigilla apposuimus. Hiis testibus*, &c. But after that time the parties began to write their names over or near the seal. And in the reign of Hen. VIII. in general they are signed by the parties, but not by the witnesses; but in the next reign the practice commenced, that the witnesses, who the parties intended should afterwards prove the execution of the instrument, should also subscribe their names.—[CHRISTIAN.]

(23) 6 Mee. & W. 200.

(24) See in general, Com. Dig. *Fait*, F. A deed may be considered as an entire transaction, operating, as to the different parties, from the time of execution by each, but not perfect till the execution by all. Any alteration made in the progress of such a transaction still leaves the deed valid as to the parties previously executing it, provided the alteration has not affected the situation in which they stood. As thus: when A. executed there were blanks, which were filled up, and interlineations made before B. executed;

seal [u] [25]. 3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of lattice work or *cancelli;* though the phrase is now used figuratively for any manner of obliteration or defacing it [26]. 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand: as, the husband, where a feme-covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like [27]. 5. By the judg-

Dissent.

By judgment or decree.

[u] 5 Rep. 23.

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but as the filling up and interlineations did not affect A., the conveyance to C. was valid. (4 B. & A. 675).—[CHITTY.] The old doctrine was, that alterations in a material part by a stranger, without the privity of either party, avoided a deed: but this has been overruled. (6 East, 309. See 4 T. R. 320). Interlineations unexplained are, in bills of exchange, presumed to have been made subsequently to the execution; in deeds and other documents, prior to it. (2 Moo. & P. 289; 3 Nev. & P. 375; 1 Keb. 22). Immaterial alterations or additions seem to have no effect upon the validity of a deed; and even material alterations, though generally ineffectual, will not invalidate it, if made with the consent of all parties concerned. (See 2 Moore, 495; 12 East, 471; 2 Moo. & P. 663; 3 Meriv. 756). But a deed which is left blank in a material part (as in the name of the grantee) is void, and cannot be set up by filling in the blank after execution. (6 Mee. & W. 200. See 9 East, 354).

(25) See in general, Com. Dig. *Fait*, F. 2. It must be an intentional breaking off or defacing by the party to whom the other is bound; for if the person bound break off or deface the seal, it will not avoid the deed. (Touchstone, c. 4, s. 6, 2). And if it appear that the seal has been affixed and afterwards broken off or defaced by accident, the deed will still be valid. (Palm. 403. See 1 B. & Cr. 682). And the defacing or cancelling a deed will not in any case divest property which has once vested by transmutation of possession. (2 Hen. Bla. 263; and see 4 B. & A. 675). If several join in a deed and be separately bound thereby, the breaking off the seal of one, with intent to discharge him from future liability, will not alter the liability of the others. (1 B. & Cr. 682).—[CHITTY.]

(26) But when an estate has passed by the deed, the merely cancelling it will not suffice, but there must be a reconveyance, or, in case of a lease, a surrender. (2 H. Bl. 259; 6 East, 86; 4 B. & A. 465).—[CHITTY.]

(27) Although the law may cast an estate upon a person against his will, no conveyance or devise will have that effect. (3 B. & Ald. 36). In the absence of any evidence to the contrary, however, the assent of the grantee or devisee will be presumed, especially if such presumption would be beneficial to him. (See 1 Moore & Sc. 199). If he have once assented to receive the estate, either by executing the deed by mere parol, or by conduct, such as by acting under the trusts, he cannot afterwards disclaim it. And if, while he affects to disclaim the estate, he conveys it to another by the same deed, that is an acceptance which estops him from saying that the estate never vested in him. (4 Ves. 97; 3 Myl. & Cr. 708).

ment or decree of a court of judicature. This was antiently the province of the court of star chamber, and now of the chancery [28]: when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery [w]. In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.

Several species of deeds.

And, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein I shall only examine the particulars of those, which, from long practice and experience of their efficacy, are generally used in the alienation of *real* estates: for it would be tedious, nay infinite, to descant upon all the several instruments made use of in *personal* concerns, but which fall under our general definition of a deed; that is, a writing sealed and delivered. The former, being principally such as serve to *convey* the property of lands and tenements from man to man, are commonly denominated *conveyances*: which are either conveyances at *common law*, or such as receive their force and efficacy by virtue of the *statute of uses*.

I. Conveyances at common law are original or derivative.

I. Of conveyances by the common law, some may be called *original*, or *primary* conveyances; which are those by means whereof the benefit or estate is created or first arises: others are *derivative*, or *secondary*; whereby the benefit or

[w] Toth. *numo.* 24. 1 Vern. 348.

It was formerly supposed that an estate of freehold could only be waived or disclaimed by matter of record. (Shepp. Touch. 285). But it is now clear, upon principle and authority, that even a parol disclaimer is sufficient, though liable of course (as a mere solemn disclaimer would be) to be rebutted by evidence of previous assent. (See 4 Man. & R. 189, n.; 1 Vent. 128; 2 Id. 108; 3 B. & Ald. 31; 6 B. & Cr. 112; 10 Id. 80; 5 Mad. 435; 2 Scott, 128; 1 Myl. & K. 195; 3 Russ. 583).

(28) The courts of common law are equally competent to nullify the deed in such case, upon the principle, that, the mind not assenting, it is not the deed of the party sought to be charged by it; and there is no necessity to resort to a court of equity for relief, when evidence at law can be adduced. (2 T. R. 765). The advantage of resorting to a court of equity is derived from the peculiar jurisdiction exercised by it of directing a deed that is void for any reason not apparent on the face of it to be delivered up to be cancelled; so that any danger from the loss of evidence is thus effectually prevented.

estate, originally created, is enlarged, restrained, transferred, or extinguished.

[310] Original conveyances are the following: 1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition: *derivative* are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeazance.

1. A feoffment.

1. A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud; and therefore feoffment is properly *donatio feudi* [x]. It is the most antient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another [29]. He that so gives, or enfeoffs, is called the *feoffor;* and the person enfeoffed is denominated the *feoffee*.

This is plainly derived from, or is indeed itself the very mode of the antient feodal donation; for though it may be performed by the word, "enfeoff" or "grant," yet the aptest word of feoffment is, "*do* or *dedi*" [y]. And it is still directed and governed by the same feodal rules; insomuch that the principal rule relating to the extent and effect of the feodal grant, "*tenor est qui legem dat feudo*," is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi* [z]." And therefore as in pure feodal donations the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, "*ne quis plus donasse praesumatur, quam in donatione expresserit*" [a]; so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) hath barely an estate for life [b]. For, as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the

[x] Co. Litt. 9.
[y] Ibid.
[z] Wright, 21.
[a] Page 108.
[b] Co. Litt. 42.

(29) This definition is not sufficiently precise; it requires the addition of words to this effect:—"by the delivery of seisin and possession of the thing given." (Shepp. Touchst. 203). In strictness, the word is not applicable unless an estate in fee-simple passes; where the conveyance is merely of an estate for life, it is properly called a *lease;* of an estate tail, a *gift*.

feoffment, the feoffee's estate ought to be confined to his person and subsist only for his life; unless the feoffor, by express provision in the creation and constitution of the estate, hath given it a longer continuance. These express provisions are indeed generally made; for this was for ages the only conveyance, whereby our ancestors were wont to create an estate in fee-simple [c], by giving the land to the feoffee, to hold to him and his heirs for ever; though it serves equally well to convey any other estate of freehold [d].

[311]

Livery of seisin.

But by the mere words of the deed the feoffment is by no means perfected, there remains a very material ceremony to be performed, called *livery of seisin;* without which the feoffee has but a mere estate at will [e]. This livery of seisin is no other than the pure feodal investiture, or delivery of corporal possession of the land or tenement; which was held absolutely necessary to complete the donation. "*Nam feudum sine investiturâ nullo modo constitui potuit*" [f]: and an estate was then only perfect, when, as the author of Fleta expresses it in our law, "*fit juris et seisinae conjunctio* [g]."

Investitures, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the *lord;* and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And, at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of by-standers, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such, as claimed title by other means, might know against whom to bring their actions.

In all well-governed nations, some notoriety of this kind has been ever held requisite, in order to acquire and ascertain the property of lands. In the Roman law *plenum dominium* was not said to subsist, unless where a man had both the *right,* and the *corporal possession;* which possession could not be acquired without both an actual intention to

[312]

[c] See Appendix, No. I.
[d] Co. Litt. 9.
[e] Litt. § 70.
[f] Wright, 37.
[g] l. 3, c. 15, § 5.

possess, and an actual seisin, or entry into the premises, or part of them, in the name of the whole[h]. And even in ecclesiastical promotions, where the freehold passes to the person promoted, corporal possession is required at this day, to vest the property completely in the new proprietor; who, according to the distinction of the canonists[i], acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by instalment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. So also even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir has not *plenum dominium*, or full and complete ownership, till he has made an actual corporal entry into the lands: for if he dies before *entry* made, *his* heir shall not be entitled to take the possession, but the heir of the person who was last actually seised[k]. It is not therefore only a mere right to enter, but the actual entry that makes a man complete owner; so as to transmit the inheritance to his own heirs: *non jus, sed seisina, facit stipitem*[l].

Symbolical livery.

Yet, the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases antiently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was [313] permitted as equivalent to occupancy of the land itself. Among the Jews we find the evidence of a purchase thus defined in the book of Ruth[m]: "now this was the manner in former time in Israel, concerning redeeming and concerning changing, for to confirm all things: a man plucked off his shoe, and gave it to his neighbour; and this was a testimony in Israel." Among the antient Goths and Swedes,

[h] *Nam apiscimur possessionem corpore et animo; neque per se corpore, neque per se animo. Non autem ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet; sed sufficit quamlibet partem ejus fundi introire.* (Ff. 41. 2. 3). And again; *traditionibus dominia rerum, non nudis pactis, transferuntur.* (Cod. 2, 3, 20).

[i] Decretal, l. 3, t. 4, c. 40.

[k] See p. 209, 227, 228.

[l] Flet. l. 6, c. 2, § 2.

[m] ch. 4, v. 7.

contracts for the sale of lands were made in the presence of witnesses who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses [n]. With our Saxon ancestors the delivery of a turf was a necessary solemnity, to establish the conveyance of lands [o]. And, to this day, the conveyance of our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchasor by re-delivery of the same, in the presence of a jury of tenants.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and encumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere simple, corporal transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion. Written deeds were therefore introduced, [314] in order to specify and perpetuate the peculiar purposes of the party who conveyed: yet still, for a very long series of years, they were never made use of, but in company with the more antient and notorious method of transfer, by delivery of corporal possession.

Livery of seisin, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made; for they are not the object of the senses: and in leases for years, or other chattel interests, it is not necessary. In leases for years indeed an actual *entry* is necessary to vest

[n] Stiernhook, de jure Sueon. l. 2, c. 4. [o] Hickes, Dissert. Epistolar. 85.

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[n] Stiernhook, de jure Sueon. l. 2, c. 4. [o] Hickes, Dissert. Epistolar. 85.

the estate in the lessee; for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini:* and, when he enters in pursuance of that right, he is then and not before in possession of his term, and complete tenant for years[p]. This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they cannot (at the common law) be made but by livery of seisin; which livery, being an actual manual tradition of the land, must take effect *in praesenti*, or not at all[q 30].

On the creation of a *freehold* remainder, at one and the same time with a particular estate for years, we have before seen that at the common law livery must be made to the particular tenant[r]. But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; "*nam quod semel meum est, amplius meum esse non potest*[s];" but it must be made to the remainder-man himself, by consent of the lessee for years: for without his consent no livery of the possession can be given[t]; partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons before given[u] for introducing the doctrine of attornments.

[315]

Livery in deed.

Livery of seisin is either in *deed*, or in *law*. Livery in *deed* is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney, (for this may as effectually be done by deputy or attorney, as by the principals themselves in person)[31], come to the land, or to

[p] Co Litt. 46.
[q] See page 165.
[r] Page 167.
[s] Co. Litt. 49.
[t] Ibid. 48.
[u] Page 288.

(30) This is still so in conveyances at common law, but it is otherwise in conveyances to uses under the statute. (1 Saund. on Uses, 3rd ed. 128-9; 4 Taunt. 20; Willes, 682; 2 Wils. 75).

(31) But the authority given for this purpose should be by deed. And, whether given by the feoffor or feoffee, it must be completely executed or performed in the lifetime of both the principals; for if he who has given the authority die before the livery of seisin is completed, the authority of his attorney, whether to give or to receive seisin, is at an end; and if the

the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring, or latch of the door, the house being quite empty [32], and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others [w]. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all [x 33]; but, if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, antiently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feodal law [y], *pares debent interesse investiturae feudi, et non alii:* for which this reason is expressly given; because the peers or vasals of the lord, being bound [316] by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to

[w] Co. Litt. 48. West. Symb. 251. [x] Litt. § 61, 414, 418.
[y] Feud, l. 2, t. 58.

other party die, the object of the authority is gone. (See 2 Roll. Ab. 8 R. pl. 4, 5; Co. Litt. 52. b.; 2 B. & Al. 156). Livery to one of several joint feoffees is good as to the whole. (2 Leon. 23; 2 Vent. 198).

(32) It is not necessary that the house should be empty; it is sufficient that the *possession* be vacant, or that the livery be made with the consent of the persons in possession. The accidental presence of a stranger not belonging to the family of the person in possession, and not meaning to defend the possession, is immaterial. (Dig. 33 a, 362; Cro. El. 322; 2 Nev. & M. 508; 2 Cr., M. & R. 120). Of course, if a person enter wrongfully, his feoffment during the presence of the true owner is void. (Perk. 45, A. 219.)

(33) By the act of induction into a benefice, a parson is put into actual possession of a part for the whole. (2 B. & A. 470).

connive at. And though, afterwards, the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed, (like that of all other attestations [z]), was still reserved to the *pares* or jury of the county [a]. Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants: because no livery can be made in this case but by the consent of the particular tenant; and the consent of one will not bind the rest [b]. And in all these cases it is prudent, and usual, to endorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it; together with the names of the witnesses [c]. And thus much for livery in deed.

Livery in law.

Livery in *law* is where the same is not made *on* the land, but *in sight of it* only; the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise; unless he dares not enter, through fear of his life or bodily harm: and then his continual claim, made yearly, in due form of law, as near as possible to the lands [d], will suffice without an entry [e]. This livery in law cannot however be given or received by attorney, but only by the parties themselves [f].

2. Gifts.

2. The conveyance by *gift, donatio*, is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it: for the operative words of conveyance in this case are *do* or *dedi* [g]; and gifts in tail are equally imperfect without livery of seisin, as feoffments in fee-simple [h]. And this is the only distinction that Littleton seems to take, when he says [i], "it is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee;" viz. feoffor is applied to a feoffment in fee-simple, donor to a gift in tail, and lessor to a lease for life, or for

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[z] See page 307.
[a] Gilb. 10, 35.
[b] Dyer, 18.
[c] See Appendix, No. I.
[d] Litt. § 421, &c.
[e] Co. Litt. 48, 254.
[f] Ibid. 52.
[g] West. Symbol. 256.
[h] Litt. § 59.
[i] § 57.

years, or at will. In common acceptation gifts are frequently confounded with the next species of deeds: which are,

3. Grants. 3. Grants, *concessiones;* the regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had[k]. For such reason all corporeal hereditaments, as lands and houses, are said to lie *in livery;* and the others, as advowsons, commons, rents, reversions, &c., to lie *in grant*[l 34]. And the reason is given by Bracton[m]: "*traditio,* or livery, *nihil aliud est quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem inductio; sed res incorporales, quae sunt ipsum jus rei vel corpori inhaerens, traditionem non patiuntur.*" These therefore past merely by the delivery of the deed. And in signiories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite), were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in its subject matter: for the operative words therein commonly used are *dedi et concessi,* "have given and granted."

4. Leases. 4. A lease is properly a conveyance of any lands or tenements, (usually in consideration of rent or other annual recompense), made for life, for years, or at will, but always for a *less* time than the lessor hath in the premises: for if it be for the *whole* interest, it is more properly an assignment than a lease. The usual words of operation in it are, "demise, grant, and to farm let; *dimisi, concessi et ad firmam tradidi.*" *Farm,* or *feorme,* is an old Saxon word signifying provisions[n]: and it came to be used instead of rent or render, because antiently, the greater part of rents were reserved in provisions; in corn, in poultry and the like; till the use of money became more frequent. So that a farmer, *firmarius,* was one who held his lands upon payment of a rent or *feorme:* though at present, by a gradual departure from the original [318]

[k] Co. Litt. 9.
[l] Ibid. 172.
[m] l. 2. c. 18.
[n] Spelm. Gloss. 229.

(34) Even where the possession is in a mere tenant from year to year, or at will, the reversion lies in grant. (7 B. & Cr. 247).

sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments; though livery of seisin is indeed incident and necessary to one species of leases, *viz.* leases for life of corporeal hereditaments; but to no other[35].

Who may make leases.

Whatever restriction, by the severity of the feodal law, might in times of very high antiquity be observed with regard to leases; yet by the common law, as it has stood for many centuries, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of any duration; for he hath the whole interest: but tenant in tail, or tenant for life, could make no leases which should

(35) Before the Statute of Frauds, a lease for any number of years might have been made by parol without writing, entry only being requisite to complete the lessee's estate; but since that statute no lease for a longer period than three years is good without writing. A deed, however, is not requisite to the validity of a lease of corporeal hereditaments, as such; although, of course, the covenants which a lessee is usually required to enter into must be by deed. (2 Wils. 27; 1 Per. & D. 440). The apparent contradiction in 2 Wils. 49, is occasioned merely by a careless expression of the court. Incorporeal hereditaments cannot be demised without deed. (4 Nev. & M. 505; 8 Ad. & E. 716).

No formal words are requisite to a lease at common law. This laxity was probably occasioned by the little estimation in which estates of this inferior nature were formerly held. "Whatever words are sufficient to express the intention of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose; and, on the contrary, if the most proper and authentic form of words whereby to describe and pass a present lease for years are made use of, yet if upon the whole deed there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties; for a lease for years being no other than a contract for the possession and profits of the lands, on the one side, and a recompense of rent or other income, on the other,—if the words made use of are sufficient to prove such a contract, in what form soever they are introduced, or however variously applicable, the law calls in the intent of the parties, and models and governs the words accordingly." (Bac. Ab. *Leases* (K.); 5 T. R. 163). The consequence of this neglect of technicality has been a vast quantity of litigation on the question whether a particular contract amounts to an actual lease, or only to an agreement for one; the difference of stamp duty required in the two cases often enabling one or other of the parties to maintain a dishonest defence upon this point. (See 1 Moo. & Sc. 259; 1 Per. & D. 440; 5 M. & W. 104; 1 Q. B. Rep. 506, and the authorities there referred to).

bind the issue in tail or reversioner; nor could a husband, seised *jure uxoris*, make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee-simple, such as parsons and vicars with consent of the patron and ordinary [o]. So also bishops, and deans, and such other sole ecclesiastical corporations as are seised of the fee-simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control. And corporations aggregate might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, by several statutes, this power where it was unreasonable, and might be made an ill use of, is restrained; and, where in the other cases the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the *restraining*, the latter the *enabling* statute. We will take a view of them all, in order of time.

Tenants for life.

Ecclesiastical persons.

Corporations.

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And, first, the *enabling* statute, 32 Hen. VIII. c. 28, empowers three manner of persons to make leases, to endure for three lives or one and twenty years; which could not do so before. As, first, tenant in tail may by such leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seised in right of his wife, in fee-simple or fee-tail, provided the wife joins in such lease, may bind her and her heirs thereby. Lastly, all persons seised of an estate of fee-simple in right of their churches, which extends not to parsons and vicars, may (without the concurrence of any other person) bind their successors. But then there must many requisites be observed, which the statute specifies, otherwise such leases are not binding [p]. 1. The lease must be by indenture; and not by deed poll, or by parol. 2. It must begin from the making, or day of the making, and not at any greater distance of time [36]. 3. If

Enabling statute, 32 Hen. 8, c. 28.

Leases by tenants in tail, husbands, and ecclesiastical persons.

[o] Co. Litt. 44. [p] Ibid.

(36) By various acts of Parliament, and also frequently by private settlements, a power is granted of making leases in possession, but not in rever-

there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be *either* for twenty-one years, *or* three lives; and not for both. 5. It must not exceed the term of three lives, or twenty-one years, but may be for a shorter term. 6. It must be of corporeal hereditaments, and not of such things as lie merely in grant; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distrein [q]. 7. It must be of lands and tenements most com-
[320] monly letten for twenty years past; so that if they had been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court roll, it is sufficient. 8. The most usual and customary feorm or rent, for twenty years past, must be reserved yearly on such lease. 9. Such leases must not be made without impeachment of waste. These are the guards, imposed by the statute (which was avowedly made for the security of farmers and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given.

Disabling statute 1 Eliz. c. 19. Leases by ecclesiastical persons.

Next follows, in order of time, the *disabling* or *restraining* statute, 1 Eliz. c. 19 (made entirely for the benefit of the successor), which enacts, that all grants by archbishops and bishops (which include even those confirmed by the dean

[q] But now by the statute 5 Geo. III. c. 17, a lease of tithes or other incorporeal hereditaments, alone, may be granted by any bishop or any such ecclesiastical or eleemosynary corporation, and the successor shall be entitled to recover the rent by an action of debt, which (in case of a freehold lease) he could not have brought at the common law.

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sion, for a certain term; the object being that the estate may not be incumbered by the act of the party beyond a specific time. Yet persons, who had this limited power of making leases in possession only, had frequently demised the premises to hold *from the day of the date;* and the courts in several instances had determined that the words *from the day of the date* excluded the day of making the deed; and that of consequence these were leases in reversion, and void. (See Cro. Jac. 258; 1 Buls. 177; 1 Rol. Rep. 387; 3 Buls. 204; Co. Litt. 46. b. But this question having been brought again before Lord Mansfield and the court of King's Bench, it was established, that *from the day* might either be inclusive or exclusive of the day; and therefore that it ought to be construed so as to effectuate these important deeds, and not to destroy them. (*Pugh* v. *Duke of Leeds*, Cowp. 714; *Freeman* v. *West*, 2 Wils. 165.—[CHRISTIAN.]—(Vide ante, p. 140, n. 2).

and chapter; the which, however long or unreasonable, were good at common law) other than for the term of one and twenty years, or three lives, from the making, or without reserving the usual rent, shall be void. Concurrent leases, if confirmed by the dean and chapter, are held to be within the exception of this statute, and therefore valid; provided they do not exceed (together with the lease in being) the term permitted by the act[r] [37]. But, by a saving expressly made, this statute of 1 Eliz. did not extend to grants made by any bishop to the crown; by which means Queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favourites, whom she

[r] Co Litt. 45.

(37) The law of concurrent leases is somewhat involved, by reason of the conflict between the ancient common law and the several statutes passed on the subject; but the practical results are as follow:

If a bishop have made a lease for twenty-one years, under the 32 Hen. 8, he may make a fresh lease for twenty-one years from the making thereof, at any time exceeding a year before the expiration of the first, which will be valid upon being confirmed by the dean and chapter. But there cannot be two leases in the same way running for *lives* at the same time, nor one lease for lives and another for years; they must be both of the latter description, or they cannot co-exist, or concur in conferring an interest upon the lessee. If the second lease be granted to any other than the lessee in the first, the lessor may lose his remedy by distress for the recovery of his rent during the continuance of the old lease, because the old lessee may pay his rent to the new lessee, who is become the reversioner, and against whom the lessor can only proceed by action of debt or covenant. (See Bac. Ab. *Leases*, (E.) 3; Coleridge's Blackstone, vol. 2, p. 320, n. 13).

The renewal of ecclesiastical leases is regulated by the statutes 6 & 7 Will. 4, cc. 20 & 64, which enact, that ecclesiastical persons shall not grant any new lease, by way of renewal of any previous lease, for two or more lives, until one or more of such lives shall have dropped, and then only by way of introducing a new life or lives in the room of the expired life or lives: and that no renewal shall be made of a lease for fifty years, until fourteen years; of a lease for thirty years, until ten; or of a lease for twenty-one years, until seven years have expired; and that no lease for a life or lives shall be granted by way of renewal of a lease for years. Renewals at shorter periods than those above mentioned are allowed in cases where it shall be certified in manner provided by the act to have been the usual practice for ten years preceding the passing of the act, (21st June, 1836); such practice in the case of a corporation sole having commenced prior to the time of the then incumbent. And renewals by way of lives are allowed, if approved, in the case of an archbishop by the Queen in council, in the case of a bishop by his archbishop, and in the case of an inferior corporation or person by the bishop and archbishop.

thus gratified without any expense to herself. To prevent which[s] for the future, the statute 1 Jac. I. c. 3, extends the prohibition to grants and leases made to the king, as well as to any of his subjects.

Extended to inferior corporations, sole and aggregate.

Next comes the statute 13 Eliz. c. 10, explained and enforced by the statutes 14 Eliz. c. 11 & 14, 18 Eliz. c. 11, and 43 Eliz. c. 29, which extend the restrictions, laid by [321] the last-mentioned statute on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which together we may collect, that all colleges, cathedrals, and other ecclesiastical, or eleemosynary corporations, and all parsons and vicars, are restrained from making any leases of their lands, unless under the following regulations: 1. They must not exceed twenty-one years, or three lives, from the making. 2. The accustomed rent, or more, must be yearly reserved thereon[38]. 3. Houses in corporations, or market towns, may be let for forty years; provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them; and provided the lessee be bound to keep them in repair: and they may also be aliened in fee-simple, for lands of equal value in recompense. 4. Where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years. 5. No lease (by the equity of the statute) shall be made without impeachment of waste[t]. 6. All bonds and covenants tending to frustrate the provisions of the statutes of 13 & 18 Eliz. shall be void.

Effect of the disabling statute.

Concerning these restrictive statutes there are two observations to be made. First, that they do not, by any construction, enable any persons to make such leases as they were by common law disabled to make. Therefore a par-

[s] 11 Rep. 71. [t] Co. Litt. 45.

(38) And where a part of land usually let for a certain rent is leased, the ancient rent must be reserved pro ratâ. (39 & 40 Geo. 3, c. 41). As to what are accustomed rents and reservations, see 2 Ad. & El. 705. Of waste lands not previously demised, there could be no accustomed rent, and the enabling statute did not apply. (7 Moore, 258). But the General Inclosure Act, 41 Geo. 3, c. 109, s. 38, authorizes leases of inclosure allotments for twenty-one years, with the consent of the bishop and patron. (See 1 & 2 Geo. 4, c. 23, and 6 & 7 Will. 4, c. 115, s. 21).

son, or vicar, though he is restrained from making longer leases than for twenty-one years or three lives, even *with* the consent of patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, *without* obtaining such consent [u] [39]. Secondly, that though leases contrary to these acts are declared void, yet they are good against the *lessor* during his life, if he be a sole corporation; and are also good against an aggregate corporation so long as the head of it lives, who is presumed to be the most concerned in interest. For the act was intended for the benefit of the successor only; and no man shall make an advantage of his own wrong [w].

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College leases.

There is yet another restriction with regard to college leases, by statute 18 Eliz. c. 6, which directs, that one-third of the old rent, then paid, should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6*s.* 8*d.*, or a quarter of malt for every 5*s.*; or that the lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges, on the market day before the rent becomes due. This is said [x] to have been an invention of lord treasurer Burleigh, and Sir Thomas Smith, then principal secretary of state; who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new-found Indies, (which effects were likely to increase to a greater degree) devised this method for upholding the revenues of colleges. Their foresight and penetration has in this respect been very apparent: for, though the rent so reserved in corn was at first but one-third of the old rent, or half of what was still reserved in money, yet now the proportion is nearly inverted; and the money arising from corn rents is, *communibus annis*, almost double to the rents reserved in money [40].

[u] Co. Litt. 44. [w] Ibid. 45. [x] Strype's Annals of Eliz.

(39) If the lease has not been confirmed by the ordinary, the acceptance of rent by the successor will not ratify the lease for the rest of the term which may be unexpired at the time of the death or cession of the lessor. (Bro. Abr. *Acceptance*, pl. 26).

(40) The price of a quarter of wheat being at present near 50*s.*, and the col-

Leases by non-resident clergy restrained.

The leases of beneficed clergymen are farther restrained, in case of their non-residence, by statutes 13 Eliz. c. 20, 14 Eliz. c. 11, 18 Eliz. c. 11, and 13 Eliz. c. 9 [41], which direct, that if any beneficed clergyman be absent from his cure above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish; but that all leases made by him, of the profits of such benefice, and all covenants and agreements of like nature, shall cease and be void [42]: except in the case of licensed pluralists, who are allowed to demise the living, on which they are non-resident, to their curates only; provided such curates do not absent themselves above forty days in any one year [43]. And thus much for leases, with their several enlargements and restrictions [y].

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[y] For the other learning relating to leases, which is very curious and diffusive, I must refer the student to 3 Bac. Abridg. 295, (title *Leases and Terms for Years*), where the subject is treated in a perspicuous and masterly manner; being supposed to be extracted from a manuscript of Sir Geoffrey Gilbert.

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leges receiving a quarter of wheat, or its value, for every 13*s.* 4*d.*, which they are paid in money, the corn rent, from the present price of wheat, will be in proportion to the money rent as four to one. But both these rents united are very far from the present value. Colleges, therefore, in order to obtain the full value of the term, take a fine upon the renewal of their leases.—[CHRISTIAN.]

(41) These statutes were repealed by the 43 Geo. 3, c. 84, and further amendments were made by the temporary statutes, 54 Geo, 3, cc. 54 & 175, and the general act of the 57 Geo. 3, c. 99, which repealed all former acts on this subject. This act was itself repealed by the 1 & 2 Vict. c. 106. (See ante, vol. 1, p. 392). By the 59th section of the last-mentioned act, all contracts or agreements for letting houses of residence, or the buildings, gardens, orchards, and appurtenances necessary for the convenient occupation of the same, belonging to any benefice, and in which spiritual persons are by the order of the bishop to reside, or which may be assigned by the bishop as residences for curates, shall be made in writing, and shall contain a condition for avoiding the same, upon a copy of such order or assignment being served upon the occupier or left at the house, or shall be void; and persons holding possession thereof after the day on which such spiritual persons are directed to reside, upon notice to that effect, forfeit 40*s.* for every day they so hold over.

(42) But by the 57 Geo. 3, c. 99, all these statutes which vacate leases by non-residence are repealed.

(43) The letting of ecclesiastical property has been facilitated by two recent statutes. The first (5 & 6 Vict. c. 27) contemplates leases for farming purposes, and enables incumbents of benefices, with the concurrence of the patron and bishop, to lease any part of the glebe or other lands and agricultural buildings for any term not exceeding fourteen years, (or, if the lessee

5. An *exchange* is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word or expressed by any circumlocution[z]. The estates exchanged must be equal in quantity[a]; not of *value*, for that is immaterial, but of *interest;* as fee-simple for fee-simple, a lease for twenty years for a lease for twenty years, and the like[44]. And the exchange may be of things that lie either in grant or in livery[b]. But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance[c]: for each party stands in the place of the other and occupies his right, and each of them hath already had corporal possession of his own land. But entry must be made on both sides; 5. Exchange at common law. Entry.

[z] Co. Litt. 50, 51. [3 Wils. 468]. [a] Litt. § 64, 65. [b] Co. Litt. 50. [c] Litt. § 62.

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covenant to improve the land, twenty-years), in possession, at a rack-rent; such lease to contain a covenant against assignment or under-letting without the consent of the incumbent, patron, and ordinary, a covenant to insure, and other covenants mentioned in the act. Certain surveys and maps are required to be made, and the act denies effect to any surrender of a lease granted under its provisions, until the concurrence of the incumbent, patron, and ordinary is obtained.

The statute, 5 & 6 Vict. c. 108, authorizes ecclesiastical corporations, aggregate or sole, (except any college or corporation of vicars choral, priest vicars, senior vicars, curates and vicars, or minor canons, and any ecclesiastical hospital or the master thereof), to lease their corporate lands or houses (except houses of residence and gardens, &c.) for any term not exceeding *ninety-nine* years in possession for building or other improvement; such leases to contain certain covenants on the lessee's part specified in the act, and to be made with the consent of the Ecclesiastical Commissioners for England; and in case of a lease by an incumbent of a benefice, with the consent of the patron. The act also authorizes, under similar restrictions, the grant of mining leases, and of leases of running water, way-leaves, water-leaves and other easements over land belonging to ecclesiastical corporations, for any term not exceeding *sixty* years; and it provides for the application of the improved rents obtained by means of leases made under its provisions.

(44) A lease for twenty years may of course be exchanged for another for one hundred or one thousand years. A tenant in tail, or of a defeasible fee, or a husband seised in right of his wife, may exchange in fee with a tenant in fee-simple, and the exchange will be good until it is avoided; and occupation of the lands taken in exchange by the issue in tail or other party entitled to avoid the exchange, is a confirmation of the exchange. (Co. Litt. 50; Perk. §§ 280, 289). Joint-tenants may exchange with a sole owner, and may take the new estate as tenants in common. (Shepp. Touchst. 296). And tenants in common may exchange with a sole owner. (Lofft, 414. See 2 Wils. 468).

for, if either party die before entry, the exchange is void, for want of sufficient notoriety [d] [45]. And so also, if two parsons, by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented, and instituted, but dies before induction; the former shall not keep his new benefice, because the exchange was not completed, and therefore he shall return back to his own [e]. For if, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title, he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges [f] [46].

Implied mutual warranty.

6. Partition.

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6. A partition, is when two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part [47]. Here, as in some instances there is a unity of interest, and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates, which they are to take and enjoy separately. By the common law coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and

[d] Co. Litt. 50. [e] Perk. § 288. [f] Page 300.

(45) And by the Statute of Frauds writing is essential; and, if one or both of the things exchanged lie in grant, a deed. (Co. Litt. 51. b.)

(46) The *liability* to re-entry follows the land in the hands of an alience, but the *right* to re-enter is personal to the party to the exchange and his heirs; so that, if A. exchange Blackacre with B. for Whiteacre, and B. sell Blackacre to C., and then A.'s heir is evicted from Whiteacre by title paramount, he may re-enter on Whiteacre; although, had C. been evicted from Whiteacre, he would have had no remedy against Blackacre. The inconveniences incident to an exchange at common law have caused it to fall into disuse; and exchanges at the present day are almost invariably effected by mutual and distinct conveyances by lease and release, which are complete without entry, and imply no other warranty than such as is expressed by the covenants for title. (See 6 Sim. 92).

The stat. 4 & 5 Will. 4, c. 30, authorizes persons entitled in fee-simple, or for limited interests, incumbents of benefices, the guardians of infants, &c., to exchange lands lying in common fields for other lands, either open or inclosed; the exchange to be effected in the manner prescribed by the act, when made to impress the old title upon the lands taken in exchange, a provision which is generally contained in the clauses respecting exchanges in inclosure acts.

(47) Vide ante, pp. 183, 185, 194.

tenants in common must have done it by deed: and in both cases the conveyance must have been perfected by livery of seisin [g] [48]. And the statutes of 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, made no alteration in this point. But the statute of frauds, 29 Car. II. c. 3, hath now abolished this distinction, and made a deed in all cases necessary [49].

Derivative conveyances.

These are the several species of *primary* or *original* conveyances. Those which remain are of the *secondary* or *derivative* sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,

7. Releases.

7. Releases; which are a discharge or conveyance of a man's right in lands or tenements, to another that hath some former estate in possession [50]. The words generally used therein are "remised, released, and for ever quit-claimed [h]:" And these releases may enure either, 1. By way of *enlarging an estate*, or *enlarger l'estate*: as, if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee [i]. But in this case the relessee must be in *possession* of some estate, for the release to work upon; for if there be lessee for years, and before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for

By way of enlarging an estate.

[g] Litt. § 250. Co. Litt. 169. [h] Litt. § 445. [i] Ibid. § 465.

(48) Each joint-tenant being already seised of the whole, (Co. Litt. 200. b.), livery of seisin cannot be necessary in this case; and at the common law, tenants in common might have effectually partitioned any corporeal hereditament by parol and livery of seisin, without deed, (Co. Litt. 169. a.); and a parol partition by joint-tenants for years was good. (Dyer, 350 b). In the case of coparceners, a deed was not requisite under any circumstances, though the subject-matter was an incorporeal hereditament; and even a rent, for equality of partition, might have been granted by parol. (Co. Litt. 169. a.). A joint partition by coparceners in tail will bind the issue. (Id. 173. b.).

(49) The distinction still exists; for the Statute of Frauds requires a writing only, and this is all that is now necessary in cases where a deed was not requisite at common law.

(50) Actual possession is not necessary, if the estate of the party who is to take the release be itself preceded by an estate in possession: thus, if A. be tenant for life, with remainder to B. for life, with remainder to C. in fee, C. may release to B., whose estate, though vested, is not in possession.

Per mitter l'estate.

want of possession in the relessee [k] [51]. 2. By way of *passing an estate*, or *mitter l'estate:* as when one of two coparceners releaseth all her right to the other, this passeth the fee-simple of the whole [l] [52]. And in both these cases there must be a privity of estate between the relessor and relessee [m]; that is, one of their estates must be so related to the other, as to make but one and the same estate in law.

[325]

Per mitter le droit (53).

3. By way of *passing a right*, or *mitter le droit:* as if a man be disseised, and releaseth to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful [n] [54].

By extinguishment.

4. By way of *extinguishment:*

[k] Litt. § 459. [l] Co. Litt. 273. [m] Ibid. 272, 273. [n] Litt. § 466.

(51) This is not accurately expressed; it is necessary that the relessee should have a vested estate, but it is not necessary that such estate should be in possession, as if there be tenant for life, remainder to B. for life, remainder to C. in fee, B. may take a release from C., although his own estate is in remainder. An estate at will is sufficient to found a release upon, (Litt. s. 460), although the reversion upon such estate does not lie in grant.

A release by way of enlargement may be restrained to pass such estate as the relessor pleases, as for life, in tail, or in fee; but a release of a right, though it may be made upon condition, cannot be otherwise restrained; it passes all the right or none, as does a release *per mitter l'estate.* (Co. Litt. 273. b.; Litt. ss. 467, 468, 469).

A release by enlargement is also distinguished from a release of a right, by requiring immediate privity of estate between the parties, that is to say, the relation of particular tenant and immediate remainderman or reversioner; in other words, the estate of the relessee must be capable of merging in that of the relessor. (Vide ante, p. 177, n. 23).

If A. make a lease for life, and the lessee make a lease for years, A. cannot release to the lessee for years for want of privity; but if A. make a lease for years, with remainder for life, A. may release to the lessee for years, because he has both a privity and an estate; or he may release to him in the remainder for life, because of the privity of seisin of the freehold. (2 Roll. Ab. 400; Co. Litt. 273. a. Vide ante, p. 177, n. 23).

(52) This kind of release can only take place between coparceners or joint-tenants, and it does not need words of inheritance. (Co. Litt. 273. b.).

(53) There must be a privity of estate between the relessor and the relessee in the first species of release mentioned, but in this release per mitter le droit, there is not or cannot be any such privity, (Co. Litt. 274. a. n. 1); nor is there any occasion for words of inheritance; and a release of a right to a particular tenant will enure to them in the reversion. (Id. sects. 452, 453; Co. Litt. 275. a.).

(54) To a release of a bare right no privity is requisite, but the relessee must have either a freehold reversion or a seisin of an estate of freehold either in deed or in law; and therefore the heir of a disseisor may take a release before entry; (Litt. sects. 447, 449); and if a disseisor make a lease

as if my tenant for life makes a lease to A. for life remainder to B. and his heirs, and I release to A.; this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder as well as of A.'s particular estate[o] [55]. 5. By way of *entry* and *feoffment*: as if there be two joint disseisors, and the disseisee releases to one of

By entry and feoffment.

[o] Litt. § 470.

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for life, with remainders over, the disseisee may release to any one of those in remainder, (Id. sects. 450, 470); and this will confirm the prior estates. But if tenant for life is disseised, he cannot take a release from his remainderman, because he has merely a right. (Id. sect. 451).

(55) Blackstone has here unaccountably stated from Littleton a case which has nothing to do with extinguishment. The lease for life to A., with remainder to B. and his heirs, is understood to be by feoffment, and so a discontinuance of the original reversion; and the reversioner's estate being thus put to a right, his release *passes* it for the benefit of the wrongful lessee for life and remainder-man, as in any other case of disseisin. "Dormit aliquando jus, moritur nunquam." For, of such high estimation is right in the eye of the law, that the law preserveth it from death and destruction; trodden down it may be, but never trodden out*. (Co. Litt. 279. a.). And this consideration explains the distinction between a release by extinguishment and a release that passes a right. Under the latter, the relessee has the same right which his relessor had, and that only; by the former, the relessor puts an end, as against all the world, to some hereditament different from that which the relessee has, and which cannot exist with it in the same person. "Releases," says Littleton, "which enure by way of extinguishment against all persons, are, where he to whom the release is made cannot have that which to him is released; as if there be lord and tenant, and the lord release to the tenant all the right which he hath in the seigniory, or all the right which he hath in the land, &c. This release goeth by way of extinguishment against all persons, because that the tenant cannot have service to receive of himself. In the same manner it is of a release made to the tenant of the land of a rent-charge or common of pasture, &c., because the tenant cannot have that which to him is released, &c.; so such releases shall enure by way of extinguishment in all ways." (Sects. 479, 480).

There is this distinction between an extinguishment and the passing of a right: a right cannot be passed by release to one who has merely a right; it must be to him who has the estate; and yet privity is no element in such a release, but the contrary. On the other hand, a release by way of extinguishment may be made to one who has privity but no estate. Thus, a lord may release his seignioral rights to his tenant after he has been disseised; but a rent-charge, as distinguished from a rent-service, can only be released to the actual tenant, because the charge is only on the land, and implies no personal privity. (Co. Litt. 268. a.).

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*Even the Statutes of Limitation only extinguished the remedy by action, &c., leaving the right in existence, and even available in some instances by remitter. But the last Statute of Limitations has destroyed the integrity of this ancient maxim of the law. (Ante, p. 266, n. 10).

them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee[p 56]. And hereupon we may observe, that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land: for the occupancy of the relessee is a matter of sufficient notoriety already[57].

8. Confirmation.

8. A confirmation is of a nature nearly allied to a release. Sir Edward Coke defines it[q] to be a conveyance of an estate or right *in esse*, whereby a voidable estate[58] is made sure and unavoidable, or whereby a particular estate is increased: and the words of making it are these, "have given, granted, ratified, approved, and confirmed[r]." An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion: yet, if
[326] he hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure[s 59]. The latter branch, or that which tends to the

[p] Co. Litt. 278.
[q] 1 Inst. 295.
[r] Litt. § 515, 531.
[s] Litt. § 516.

(56) This is only true where tenant in fee-simple is disseised: if tenant for life or in tail is disseised by two, his release to one of them shall enure to both on account of the fee-simple gained by them by wrong; but where the reversion is in the crown, the disseisors gain only the estate of the subject, and then a release to one of them shall oust his companion. (Co. Litt. 275. b.). But if a disseisor infeoff two in fee, and the disseisee release to one of the feoffees, this shall enure to both the feoffees, because they come in by title. (Litt. s. 472).

(57) But a release must be by deed, (Cro. Car. 383), although it may be doubted whether signing is necessary even to a release per mitter l'estate. (See ante, p. 306, n.; and 6 Madd. 166).

(58) The distinction between voidable and void must not be lost sight of here, for a confirmation *as such* has no operation whatever upon a void estate. (Gilb. Ten. 75; but see Litt. sect. 516).

(59) To a confirmation of a voidable estate of this kind, writing and even express words are not essential; any conduct from which assent may be unequivocally inferred, such as the acceptance of rent, &c., is sufficient. (Co. Litt. 295. b.; 3 M. & P. 59).

increase of a particular estate is the same in all respects, with that species of release, which operates by way of enlargement.

9. Surrender.

9. A surrender, *sursumredditio*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater. It is defined [t], a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words, "hath surrendered, granted, and yielded up [60]." The surrenderor must be in possession [u 61], and the surrenderee must have a higher [62] estate, in which the estate surrendered may

[t] Co. Litt. 337. [5 M. & P. 785]. [u] Ibid. 338.

A confirmation may be available where a release would not, as if tenant for life lease for forty years, the reversioner in fee cannot for want of privity release to the tenant for years while the life estate subsists, but he may confirm the lease, as is said in the text, although this seems more like a new lease than a confirmation. So, a disseisee may confirm his disseisor's lease for years, though he could not release his right to him. (Co. Litt. 296). As a release of right passes all the right, so a confirmation (though it may be as to part only of the lands) must be of all the estate, and requires no words of limitation, nor can it be restrained by express words. (Id.). As to terms, however, a distinction is taken, that if the *term* be confirmed, any subsequent words limiting the confirmation to a part of the term are repugnant and void; but a confirmation of the *land* may be for part of the term, because it does not commence with an assent to all. (Gilb. Ten. 76; Co. Litt. 297. a.) But if my disseisor make a lease for life with remainder in fee, I may confirm the lease for life without confirming the remainder, although a release to the tenant for life would have enured to him in remainder. But a confirmation of the remainder implies a confirmation of the particular estate which is necessary to support it. (Litt. sect. 521).

(60) But these words are not essential to a surrender. (See Wils. 127; Cro. Jac. 169; 2 Wils. 26; 5 Moo. & P. 800, and ante, p. 338, n.). The Statute of Frauds requires a surrender to be in writing; but sealing is not necessary, unless the estate be in remainder or reversion, or the subject-matter an incorporeal hereditament. (2 Roll. Ab. 498, (K.), pl. 2).

A surrender must be of the whole estate or it will not operate as such. (Touchst. 308; Hard. 417). It cannot be made to take effect in futuro. (1 Mee. & W. 50; 3 Id. 328). But it may be made upon a condition precedent. (Perk. s. 624; 12 East, 134; 1 Mee. & W. 676).

(61) That is to say, must be vested; an estate in remainder may be surrendered to a more remote remainderman.

(62) Not necessarily higher, since a lessee for years may surrender to a reversioner for years. (Cro. El. 303; 5 B. & Cr. 123).

merge: therefore tenant for life cannot surrender to him in remainder for years [w]. In a surrender there is no occasion for livery of seisin [x]; for there is a privity of estate between the surrenderor, and the surrenderee; the one's particular estate, and the other's remainder are one and the same estate; and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes: since the reversion of the relessor, or confirmor, and the particular estate of the relessee, or confirmee, are one and the same estate; and where there is already a possession, derived from such a privity of estate, any farther delivery of possession would be vain and nugatory [y] [63].

10. Assignment.

10. An *assignment* is properly a transfer, or making over to another, of the right one has in *any* estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this: that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property [64], and the

[327]

[w] Perk. § 589. [x] Co. Litt. 50. [y] Litt. § 460.

(63) This is a surrender by deed; but there is also what is termed a surrender in law, as if a person who has a term for years, or an estate for life, accept a new lease incompatible with the interest granted by the former lease, this is a surrender in law, being an implied abandonment of the former term. (5 Co. 11; 2 Prest. Conv. 138; 1 Per. & Dav. 440; 2 Mee. & W. 882). And an agreement between the lessor and the assignee of the term, whereby the former agreed to pay an annual sum over and above the rent towards the premium paid by the assignee to the lessee, operates as a surrender of the whole term. (1 T. R. 441; see also 6 East, 86; 12 East, 134; 2 B. & Al. 119).—[CHITTY.]

(64) If the land is transferred for the entire residue of the term, it is an assignment, although the assignor may have used words of demise, and, by reserving rent or otherwise, have endeavoured to preserve a reversion in himself; as, on the other hand, an "assignment" for a portion of the term, less by only one day than the residue, is an underlease. (3 Bligh, 31; Dougl. 178; 3 Scott, N. R. 593). The important distinction in practice between an assignment and an underlease is, that an underlessee is not liable, as an assignee is, to be sued by the original lessor, upon the reservations or covenants contained in the original lease. (Dougl. 183). And if, after an underlease, the original lessor accepts a surrender of the mesne lease, he loses all his remedies upon the covenants. (Moor, 94; 3 T. R. 393, 678).

assignee stands, to all intents and purposes, in the place of the assignor[63].

11. A defeazance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated[z] or totally undone. And in this manner mortgages were, in former times, usually made; the mortgagor enfeoffing the mortgagee, and he, at the same time, executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money borrowed, at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the antient law[a]; and, therefore, only indulged; no subsequent secret revocation of a solemn con- 11. Defeazance

[z] From the French verb *defaire, infectum reddere.* [a] Co. Litt. 236.

(63) This is far from being universally true; for there is a variety of distinctions when the assignee is bound by the covenants of the assignor, and when he is not. The general rule is, that he is bound by all covenants which run with the land; but not by collateral covenants which do not run with the land. As if a lessee covenants for himself, his executors, and administrators, concerning a thing not in existence, as to build a wall upon the premises, the assignee will not be bound; but the assignee will be bound, if the lessee has covenanted for himself and *assigns.* Where the lessee covenants for himself, his executors and administrators, to reside upon the premises, this covenant binds his assignee, for it runs with, or is appurtenant to, the thing demised. (2 Hen. Bl. 133). The assignee in no case is bound by the covenant of the lessee to build a house for the lessor any where *off the premises,* or to pay money to a *stranger.* (5 Co. 16). The assignee is not bound by a covenant broken *before* assignment. (3 Burr. 1271; see Com. Dig. *Covenant*). But if an underlease is made, even for a day less than the whole term, the underlessee is not liable for rent or covenants to the original lessee, like an assignee of the whole term. (Dougl. 56, 174, 183).

An assignee is liable for rent only whilst he continues in possession under the assignment. (2 Cr., M. & R. 18). And he is held not to be guilty of a fraud, if he assigns even to a beggar, or to a person leaving the kingdom, provided the assignment be executed before his departure. (1 B. & P. 21).—[CHRISTIAN.] The same principle prevails in equity. (2 Vern. 103; 8 Ves. 95; 1 Sch. & Lef. 310; 4 Myl. & Cr. 534). But the assignee's liability commences upon acceptance of the lease, though he never enter, (1 B. & B. 238); and he is discharged, in respect of all subsequent breaches, by assigning over, although his assignee never enter. (3 Doug. 19). The lessee remains liable upon his covenants notwithstanding assignment, but he is considered as a surety merely for the assignee, who is bound to indemnify him from any loss, so long as he remains assignee, but not afterwards, unless he has expressly covenanted to do so. (3 M. & Sc. 561).

veyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent (as rents, of which no seisin could be had till the time of payment; and so also annuities, conditions, warrantics, and the like), were always liable to be recalled by defeazances made subsequent to the time of their creation [b] [64].

Defeazance subsequent.

II. There yet remain to be spoken of some few conveyances which have their force and operation by virtue of the *statute of uses*.

Uses and trusts.

Uses and *trusts* are, in their original, of a nature very similar, or rather exactly the same: answering more to the *fidei-commissum* than the *usus-fructus* of the civil law: which latter was the temporary right of using a thing, without having the ultimate property or full dominion of the substance [c]. But the *fidei-commissum*, which usually was created by will, was the disposal of an inheritance to one, [328] in confidence that he should convey it, or dispose of the profits, at the will of another. And it was the business of a particular magistrate, the *prætor fidei-commissarius*, instituted by Augustus, to enforce the observance of this confidence [d]. So that the right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice: which occasioned that known division of rights by the Roman law, into *jus legitimum*, a legal right, which was remedied by the ordinary course of law; *jus fiduciarium*, a right in trust, for which there was a remedy

[b] Co. Litt. 237. [c] Ff. 7. 1. 1. [d] Inst. 2, tit. 23.

(64) See 2 B. & Cr. 179; 6 Taunt. 289. A lease for years may be defeated by subsequent stipulation, or rather, perhaps, made defeasible upon entry; and this is occasionally done for the purpose of reviving a condition dispensed with in a particular instance, and thus discharged, according to the anomalous doctrine in *Dumpor's case* (4 Rep. 119), for ever. (See 7 Taunt. 12).

A defeazance must be by matter as high as the instrument to be defeated, so that a bond or covenant cannot be defeated at law by writing unsealed, (Cr. El. 697; 5 B. & Al. 187); although such an agreement might be enforced in equity, (1 Russ. & M. 178); and if executed might even operate at law as an accord and satisfaction, satisfying, not defeating, the obligation. (3 T. R. 599; 1 East, 619).

in conscience; and *jus precarium*, a right in courtesy, for which the remedy was only by intreaty or request[e]. In our law, a use might be ranked under the rights of the second kind; being a confidence reposed in another who was tenant of the land, or *terre-tenant*, that he should dispose of the land according to the intentions of *cestuy que use*, or him to whose use it was granted, and suffer him to take the profits[f]. As, if a feoffment was made to A. and his heirs, to the use of (or in trust for) B. and his heirs; here, at the common law, A. the *terre-tenant* had the legal property and possession of the land, but B. the *cestuy que use* was, in conscience and equity, to have the profits and disposal of it.

Introduced to evade the Statute of Mortmain.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III.[g], by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but to *the use of* the religious houses[h]: which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience; and, therefore, assumed the jurisdiction which Augustus had vested in his *praetor*, of compelling the execution of such trusts in the court of chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet, if a testator had enfoffed another to his own use, and so was possessed of the use only, such use was devisable by will. But we have seen[i] how this evasion was crushed in its infancy, by statute 15 Ric. 2, c. 5, with respect to religious houses.

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Yet, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes: particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his lifetime to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time re-

[e] Ff. 43. 26. 1. Bacon on Uses, 8°. 306.

[f] Plowd. 352.

[g] Stat. 50 Edw. III. c. 6. 1 Ric. II. c. 9. 1 Rep. 139.

[h] See page 271.

[i] Page 272.

quire. Till, at length, during our long wars in France, and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal; through the desire that men had (when their lives were continually in hazard) of providing, for their children by will, and of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore, about the reign of Edw. IV., (before whose time, lord Bacon remarks [k], there are not six cases to be found relating to the doctrine of uses), the courts of equity began to reduce them to something of a regular system.

Doctrine of uses.

Originally it was held that the chancery could give no relief, but against the very person himself intrusted for *cestuy que use*, and not against his heir or alienee. This was altered in the reign of Henry VI., with respect to the heir [l]; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use [m]. But a purchasor for a valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held, that neither the king or queen, on account of their dignity royal [n], nor any
[330] corporation aggregate, on account of its limited capacity [o], could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust. And, if the feoffee to uses died without heir, or committed a forfeiture or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, were liable to perform the use [p]: because they were not parties to the trust, but came in by act of law; though doubtless their title in reason was no better than that of the heir.

On the other hand the use itself, or interest of *cestuy que use*, was learnedly refined upon with many elaborate dis-

[k] On Uses, 313.
[l] Keilw. 42. Year-book, 22 Edw. IV. 6.
[m] Keilw. 46. Bacon of Uses, 312. Bacon, 347.
[n] Bro. Abr. tit. *Feoffm. al uses*, 31. Bacon of Uses, 346, 347.
[o] Bro. Abr. tit. *Feoffm. al uses*, 40.
[p] 1 Rep. 122.

tinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession [65]: as annuities, ways, commons, and authorities *quæ ipso usu consumuntur* [q]: or whereof the seisin could not be instantly given [r] [66]. 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another, without any consideration, equity presumes that he meant it to the use of himself [s], unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions [t]. But, if either a good or a valuable consideration appears, equity will immediately raise a use correspondent to such consideration [u]. 3. Uses were descendible according to the rules of the common law, in the case of inheritances in possession [w]; for in this and many other respects *aequitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. 4. Uses might be assigned by secret deeds between the parties [x], or be devised by last will and testament [y]; for, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary; and, as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But *cestuy que use* could not at common law aliene the legal interest of the lands, without the concurrence of his feoffee [z]; to whom he was accounted by law to be only tenant at sufferance [a]. 5. Uses were not liable to any of the feodal burthens; and particularly did not

Descendible.

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Uses not subject to feudal burthens.

[q] 1 Jon. 127.
[r] Cro. Eliz. 401.
[s] See page 296.
[t] 1 And. 37.
[u] Moor. 684.
[w] 2 Roll. Abr. 780.
[x] Bacon of Uses, 312.
[y] Ibid. 308.
[z] Stat. 1 Ric. III. c. 1.
[a] Bro. Abr. ibid. 23.

(65) The most subtle distinctions were made in the application of this rule: a rent could be granted to a use, because one hand might receive it and pay it over to another; a common could not, because the occupation or possession and the benefit were all one; no person could depasture his cattle to the use of another. An annuity could not be granted to a use, because it had no savour of the realty.

(66) That is to say, where the estate out of which the use is to arise is not in present existence, as if a man should bargain and sell lands which should hereafter descend to him.

escheat for felony or other defect of blood; for escheats, &c. are the consequence of *tenure*, and uses are *held* of nobody: but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use [b]. 6. No wife could be endowed, or husband have his curtesy, of a use [c] [67]: for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the original of modern jointures [d]. 7. A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestuy que use* [e]. For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it.

It is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and nicetics which the ingenuity of the times (abounding in subtile disquisitions) deduced from this child of the imagination, when once a departure was permitted from the plain simple rules of property established by the antient law. These principal outlines will be fully sufficient to shew the ground of lord Bacon's complaint [f], that this course of proceeding "was turned to deceive many of their just and reasonable rights. A man that had cause to sue for land, knew not against
[332] whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease." To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestuy que use* [g]; allowed actions for the freehold to be brought against him,

[b] Jenk. 190.
[c] 4 Rep. 1. 2 And. 75.
[d] See page 137.
[e] Bro. Abr., tit. *Executions*, 90.
[f] Use of the Law, 153.
[g] Stat. 50 Edw. III. c. 6. 2 Ric. II. sess. 2, 3. 19 Hen. VII. c. 15.

(67) Courts of equity, however, began very early to allow the husband his curtesy out of his wife's equitable inheritances. Ante, p. 127, n.

if in the actual pernancy or enjoyment of the profits [h]; made him liable to actions of waste [i]; established his conveyances and leases made without the concurrence of his feoffees [k]; and gave the lord the wardship of his heir, with certain other feodal perquisites [l].

Statute 27 Hen. 8, c. 10, for transferring uses into possession.

These provisions all tended to consider *cestuy que use* as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 Hen. VIII. c. 10, which is usually called the *statute of uses*, or, in conveyances and pleadings, the statute *for transferring uses into possession*. The hint seems to have been derived from what was done at the accession of king Richard III.; who, having, when duke of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the crown (as the law was then understood) have been entitled to hold the lands discharged of the use. But, to obviate so notorious an injustice, an act of Parliament was immediately passed [m], which ordained, that, where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named; and that, where he stood solely enfeoffed, the estate itself should vest in *cestuy que use* in like manner as he had the use. And so the statute of Hen. VIII., after reciting the various inconveniences before-mentioned, and many others, enacts, that "when any person shall be *seised* [68] of lands, &c., to the use, confidence, or trust, of any other person or body politic, the person or [333] corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, &c., of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him

[h] Stat. 1 Ric. II. c. 9. 4 Hen. IV. c. 7, c. 15. 11 Hen. VI. c. 3. 1 Hen. VII. c. 1.

[i] Stat. 11 Hen. VI. c. 5.

[k] Stat. 1 Ric. III. c. 1.

[l] Stat. 4 Hen. VII. c. 17. 19 Hen. VII. c. 15.

[m] 1 Ric. III. c. 5.

(68) This word excludes copyholds and estates for years from the operation of the statute; although a use for a term of years, if founded on the seisin of a freeholder, is executed by the statute; as is a use declared upon a seisin of a remainder or reversion. (5 T. R. 124).

or them that have the use, in such quality, manner, form, and condition as they had before in the use." The statute thus *executes* the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession; thereby making *cestuy que use* complete owner of the lands and tenements, as well at law as in equity.

Decisions of the courts of common law upon the Statute of Uses.

The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestuy que use* into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only were held capable of being seised to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchasor discharged of the use, nor be liable to dower or curtesy, on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to *cestuy que use* as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of *cestuy que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

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Conveyance to uses less strictly construed than assurances at the common law.

The various necessities of mankind induced also the judges very soon to depart from the rigour and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses, than upon others. Hence it was adjudged, that the use need not always be executed the instant the conveyance is made: but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contin-

gency, to happen within a reasonable period of time; and in the meanwhile the antient use shall remain in the original grantor: as, when lands are conveyed to the use of A. and B., after a marriage shall be had between them [n], or to the use of A. and his heirs, till B. shall pay him a sum of money, and then to the use of B. and his heirs [o]. Which doctrine, when devises by will were again introduced, and considered as equivalent, in point of construction, to declarations of uses, was also adopted in favour of *executory devises* [p]. But herein these, which are called *contingent* or *springing* uses, differ from an executory devise; in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute; and, therefore, if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed for ever [q]: whereas, by an executory devise, the freehold itself is transferred to the future devisee. And, in both these cases, a fee may be limited to take effect after a fee [r]; because, though that was forbidden by the common law in favour of the lord's escheat, yet when the legal estate was not extended beyond one fee-simple, such subsequent uses (after a use in fee) were, before the statute, permitted to be limited in equity; and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held that a use, though executed, may change from one to another by circumstances *ex post facto* [s]; as, if A. makes a feoffment to the use of his [335] intended wife and her eldest son, for their lives, upon the marriage the wife takes the whole use in severalty; and, upon the birth of a son, the use is executed jointly in them both [t]. This is sometimes called a *secondary*, sometimes a *shifting* use. And, whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is stiled a *resulting* use [69]. As, if a man makes a feoffment to

Springing uses.

Shifting uses.

Resulting uses.

[n] 2 Roll. Abr. 791. Cro. Eliz. 439.
[o] Bro. Abr. tit. *Feoffm. al uses*, 30.
[p] See page 173.
[q] 1 Rep. 134. 138. Cro. Eliz. 439.
[r] Pollexf. 78. 10 Mod. 423.
[s] Bro. Abr. tit. *Feoffm. al uses*, 30.
[t] Bacon of Uses, 351.

(69) A resulting use is considered for the purposes of descent to be the old estate of the settlor, and so formerly was an estate expressly limited

the use of his intended wife for life, with remainder to the use of her first-born son in tail; here, till he marries, the use results back to himself; after marriage it is executed in the wife for life: and, if she dies without issue, the whole results back to him in fee[u]. It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow was a deed of defeazance coeval with the grant itself, (and, therefore, esteemed a part of it), upon events specifically mentioned[w]. And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead[x]. And this was permitted, partly to indulge the convenience, and partly the caprice, of mankind; who (as Lord Bacon observes[y]) have always affected to have the disposition of their property, revocable in their own time, and irrevocable ever afterwards.

Instances in which the statute does not execute the use; so that the legal estate remains in the trustee.

By this equitable train of decisions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use[z]," and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a farther use to another person is repugnant, and, therefore, void[a]. And, therefore, on a feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity: not adverting that the instant the first use was executed in B., he became seised to the use of C., which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down through a hundred uses upon uses, till finally executed in

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Decision in *Tyrrell's case*, that the statute does not execute a use declared upon a use.

[u] Bacon of Uses, 350. 1 Rep. 120.
[w] See page 327.
[x] Co. Litt. 237.
[y] On Uses, 316.
[z] Dyer, 155.
[a] 1 And. 37. 136.

back to him; but now such an *express* limitation confers a new estate by purchase. (Stat. 3 & 4 Will. 4, c. 106, s. 3, ante, p. 240, n.

the last *cestuy que use*[70]. Again, as the statute mentions only such persons as were *seised* to the use of others, this was held not to extend to terms of years or other chattel interests, whereof the termor is not *seised*, but only *possessed*[b]; and, therefore, if a term of one thousand years be limited to A.; to the use of (or in trust for) B., the statute does not execute this use, but leaves it as at common law[c]. And lastly, (by more modern resolutions) where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust[d 71].

Use upon conveyance of a chattel is not executed.

Use implied from the nature of the use declared.

Of the two more ancient distinctions the courts of equity quickly availed themselves. In the first case, it was evident that B. was never intended by the parties to have any beneficial interest: and, in the second, the *cestuy que use* of the term was expressly driven into the court of chancery to seek his remedy: and therefore that court determined, that, though these were not *uses* which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed[e]. To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of *trusts;* and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance[f].

Continuance of the old uses under the name of trusts.

[b] Bacon, Law of Uses, 335. Jenk. 244.

[c] Poph. 76. Dyer, 369. [2 T. R. 448].

[d] 1 Eq. Cas. Ab. 383, 384.

[e] 1 Hal. P. C. 248.

[f] Vaugh. 50. Atk. 591.

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(70) It is the practice to introduce only the names of the trustee and the *cestuy que trust;* the estate being conveyed to A. and his heirs, *to the use of* A. *and his heirs*, in trust for B. and his heirs; and thus this important statute has been effectually repealed by the repetition of half-a-dozen words. —[CHRISTIAN.] And the principle of the decision in *Tyrrel's case* has been carried so far, as actually in particular limitations to prevent the execution of any use at all by the statute. Thus, under a common-law conveyance to A. to the use of A., to the use of B., A. is held to be in at common law, and not by the statute, which only applies where one person is seised to the use of *another;* and yet the use to B., being limited upon a use, is not executed by the statute. (6 B. & Cr. 305).

(71) 2 Taunt. 109. See 12 East, 455; 1 Nev. & P. 401; 1 Ves. & B. 485; 1 Scott, 542; 4 Mee. & Welsb. 421.

Declaration of trust to be in writing.

However, the courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. The statute of frauds, 29 Car. II. c. 3, having required that every declaration, assignment or grant of any trust in lands or hereditaments, (except such as arise from implication or construction of law), shall be made in writing signed by the party, or by his written will; the courts now consider a trust-estate (either when expressly declared, or resulting by such implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law: and, by a long series of uniform determinations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchasor without notice [g]; which, as *cestuy que use* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes, and recognizances, (by the express provision of the statute of frauds [72]), to forfeiture, to leases and other incumbrances, nay, even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower, more from a cautious adherence to some hasty precedents [h 73], than from any well-grounded principle [74]. It hath also been held not liable to escheat to

Nature of the estates of trustee and cestui que trust.

[g] 2 Freem. 43. [h] 1 Chanc. Rep. 254. 2 P. Wms. 610.

(72) And now more completely under the stat. 1 & 2 Vict., c. 110.

(73) Which have been since overruled by the legislature. (Stat. 3 & 4 Will. 4, c. 105, ante, p. 131, n. 41).

(74) It has been decided, that when the legal and equitable estates meet in the same person, the trust or equitable estate is merged in the legal estate: as, if a wife should have the legal estate and the husband the equitable; and if they have an only child, to whom these estates descend, and who dies intestate without issue, the two estates having united, the descent will follow the legal estate, and the estate will go to an heir on the part of the mother; and thus, which appears strange, the

the lord, in consequence of attainder or want of heirs[i]: because the trust could never be intended for his benefit. But let us now return to the statute of uses.

Effect of the Statute of Uses on the form of conveyances.

The only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only antient conveyance of corporeal freeholds: the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead. But this now has given way to

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12. Covenant to stand seised to uses.

12. A twelfth species of conveyance, called a *covenant to stand seised to uses:* by which a man, seised of lands, covenants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee[75]. Here, the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land[k], without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations as those of blood or marriage.

[i] Hard. 494. Burgess and Wheat. Hil. 32 Geo. II. in Canc.
[k] Bacon, Use of the Law, 151.

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beneficial interest will pass out of one family into another, between whom there is no connexion by blood. (Doug. 741).—[CHRISTIAN.]

(75) This and the next species of conveyance, viz. bargain and sale, are to be distinguished by the nature of the instrument, and not by the words merely; for the words "covenant to stand seised to uses" are not essential in the one, nor "bargain and sell" in the other. For if a man for natural love and affection, (or without stating the relationship or consideration, as that may be given in evidence, (1 Rep. 175; 2 Str. 934)), bargain and sell his lands to the use of his wife or child, it is a covenant to stand seised to uses, and without enrolment vests the estate in the wife or child: so, if for a pecuniary consideration he *covenants to stand seised* to the use of a stranger, if this deed be enrolled within six months, it is a good and valid bargain and sale under the statute, and the estate vests in the purchaser. (7 Co. 40 b; 2 Inst. 672; 1 Leon. 25; 1 Mod. 175; 2 Lev. 10; 2 Mee. & W. 503; 2 Nev. & M. 602; 10 Mee. & W. 608; 1 Keen, 795). A bargain and sale without enrolment may operate as a grant or surrender, which shews that the words "bargain and sell" have no precise legal import. (1 Prest. Conv. 38).—[CHITTY.]

13. Bargain and sale.

13. A thirteenth species of conveyance, introduced by this statute, is that of a *bargain and sale* of lands [76]; which is a kind of a real contract, whereby the bargainor for some pecuniary consideration [77] bargains and sells, that is, contracts to convey, the land to the bargainee; and becomes by such a bargain trustee for, or seised to the use of, the bargainee; and then the statute of uses completes the purchase [l]; or, as it hath been well expressed [m], the bargain first vests the use, and then the statute vests the possession. But, as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give: to prevent therefore clandestine conveyances of freeholds, it was enacted, in the same session of parliament, by statute 27 Hen. VIII. c. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and *enrolled* within six months in one of the courts of Westminsterhall or with the *custos rotulorum* of the county [78]. Clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious, till about six years before [n]; which also occasioned them to be overlooked in framing the statute of uses; and therefore such bargains and sales are not directed to be enrolled. But how impossible it is to foresee, and provide against, *all* the consequences of innovations! This omission has given rise to

By stat. 27 Hen. 8, c. 16, bargains and sales of freehold to be by indenture and enrolled.

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14. Lease and release.

14. A fourteenth species of conveyance, viz. by *lease and*

[l] Bacon, Use of the Law, 150. [m] Cro. Jac. 696. [n] See page 142

(76) A bargain and sale, as well as a covenant to stand seised, may be made of a freehold reversion or remainder; and even while attornment was necessary to perfect grants at common law, these conveyances under the Statute of Uses were effectual without that ceremony. (5 T. R. 129).

(77) The consideration need not be paid by the bargainee, it is sufficient that it is paid on his account. (2 Roll. Ab. 784, pl. 6; Winch, 61).

(78) The bargain and sale, if duly enrolled within the six months, (as to which, see stat. 3 & 4 Will. 4, c. 74, s. 41), is considered to have operated *ab initio*, so as to defeat any conveyance made in the interim by the bargainor; and to set up any conveyance by the bargainee; but if it is not enrolled in due time, then it is treated as void *ab initio*, so as to set up an adverse conveyance, made within the six months. (Cro. Jac. 53, 109; 4 Rep. 71; Hob. 165).

release; first invented by Serjeant Moore, soon after the statute of uses, and now the most common of any, and therefore not to be shaken; though very great lawyers (as, particularly, Mr. Noy, Attorney-General to Charles I.) have formerly doubted its validity [o]. It is thus contrived. A lease, or rather bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee [79]. Now, this, without any enrolment [80], makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the *use* of the term for a year; and then the statute immediately annexes the *possession.* He therefore being thus in possession, is capable of receiving a release of the freehold and reversion; which, we have seen before [p], must be made to a tenant in possession: and, accordingly, the next day, a release is granted to him [q]. This is held to supply the place of livery of seisin: and so a conveyance by lease and release is said to amount to a feoffment [r] [81].

15. To these may be added deeds to *lead* or *declare the uses* of other more direct conveyances, as feoffments, fines, and recoveries: of which we shall speak in the next chapter: and, 15. Deeds to lead or declare uses.

16. Deeds of *revocation of uses;* hinted at in a former page [s], and founded in a previous power, reserved at the raising of the uses [t], to revoke such as were then declared; 16. Deeds of revocation or uses.

[o] 2 Mod. 252.
[p] Page 324.
[q] See Appendix, No. II. § 1, 2.
[r] Co. Litt. 270. Cro. Jac. 604.
[s] Page 335.
[t] See Appendix, No. II., page xi.

(79) The lease for a year, always a merely formal part of the conveyance, is now rendered unnecessary by the statute 4 & 5 Vict. c. 21, which requires that in order to be operative without a lease for a year, the release should refer to the act, and should bear, in addition to its own stamp, the stamp of a lease for a year.

(80) Because the Statute of Enrolments (27 Hen. 8, c. 16) applies only to bargains and sales of estates of freehold; and without any entry, (which is necessary to perfect a demise at the common law), because the statute vests the possession at once in the bargainee.

(81) But it is an innocent conveyance, and, however extensive in its terms, passes no more than the conveying party may lawfully grant; so that it is incapable of effecting a disseisin or causing a forfeiture, and thus differs from a feoffment.

and to appoint others in their stead, which is incident to the power of revocation[u]. And this may suffice for a specimen of conveyances founded upon the statute of uses: and will finish our observations upon such deeds as serve to *transfer* real property.

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Deeds to charge and discharge lands.

Before we conclude, it will not be improper to subjoin a few remarks upon such deeds as are used not to *convey*, but to *charge* or incumber, lands, and to *discharge* them again: of which nature are, *obligations* or bonds[82], *recognizances*, and *defeazances* upon them both.

1. Obligation or bond.

1. An *obligation* or bond, is a deed[v] whereby the obligor obliges himself, his heirs[83], executors, and administrators, to pay a certain sum of money to another at a day appointed[84]. If this be all, the bond is called a single one, *simplex obligatio:* but there is generally a condition added, that, if the obligor does some particular act, the obligation shall be void, or else shall remain in full force: as, payment of rent; performance of covenants in a deed; or repayment

[u] Co. Litt. 237. [v] See Appendix, No. III., page xiii.

(82) A bond is here erroneously classed among deeds which charge lands. It has no such effect at law either before or after the death of the obligor. It merely creates a debt which binds the heirs of the obligor (if heirs are named in the instrument) to the extent of the value of the real assets descended to them; but it does not bind the lands themselves, either in the hands of the obligor or in those of his heirs, or of a purchaser from either of them. In equity, indeed, under the doctrine of tacking, and after the death of the obligor, a bond may have the effect of imposing an additional charge upon land already charged.

(83) Not necessarily his heirs, who are only bound if named; and a bond will be good though it does not name the heirs.

(84) A bond is not so much a promise or obligation as an *acknowledgment* of a debt under seal. (Vin. Ab. *Obligation* (L)). It requires no technical words; any sealed writing distinctly acknowledging a debt, present or future, is a bond: thus, a memorandum, that "I have had of A. £20, of which £10 are behind;" or, that "I do owe £10 to A., to be paid at Easter," if sealed,—is a bond. Consequently, every unconditional covenant to pay a sum certain is a bond, although every bond is not necessarily a covenant; for one who is no party to an indenture may take under it a right to sue in debt, but not to sue in covenant. (Comb. 219; 5 B. & Cr. 355; Touchstone, 368; Cr. El. 268; Vin. Ab. *Debt* (D); Comb. 219; 8 Moore, 88).

of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one-half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute, at law, and charges the obligor, while living; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a *direct*, yet a *collateral*, charge upon the lands [85]. How it affects the personal property of the obligor, will be more properly considered hereafter.

Effect of an impossible or illegal condition.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single, and unconditional: for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void: for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible, by the act of [341] God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved: for no prudence or foresight of the obligor could guard against such a contingency[w]. On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law: but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought; *viz.* his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed; the damages

The whole penalty not always recoverable.

[w] Co. Litt. 206.

(85) See note (82) ante. If in a bond the obligor *binds himself*, without adding his *heirs, executors, and administrators*, the executors and administrators are bound, but not the heir; (Shep. Touch. 369); for the law will not imply the obligation upon the heir. (Co. Litt. 209. a.) A bond does not seem properly to be called an incumbrance upon land; for it does not follow the land like a recognizance and a judgment; and even if the heir at law alienes the land, the obligee in the bond by which the heir is bound can have his remedy only against the person of the heir, to the amount of the value of the land; and he cannot follow it when it is in the possession of a *bonâ fide* purchaser. (Bull. N. P. 175). —[CHRISTIAN.]

sustained, upon non-performance of covenants; and the like. And the like practice having gained some footing in the courts of law [x], the statute 4 & 5 Ann. c. 16, at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge [86].

2. Recognizance.

2. A *recognizance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorized [y], with condition to do some particular act; as, to appear at the assises, to keep the peace, to pay a debt, or the like. It is in most respects like another bond; the difference being chiefly this, that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an acknowledgment of a former debt upon record; the form whereof is, "that A. B. doth acknowledge to owe to our lord the king, to the plaintiff, to C. D., or the like, the sum of ten pounds;" with condition to be void on performance of the thing stipulated; in which case the king, the plaintiff, C. D. &c., is called the cognizee, "*is cui cognoscitur*;" as he that enters into the recognizance is called the cognizor, "*is qui cognoscit*." This being either certified to or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal: so that it is not in strict propriety a deed, though the effects of it are greater
[342] than a common obligation; being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrolment on record [z]. There are also other recognizances of a private kind, *in nature of a statute staple*, by virtue of the statute 23 Hen. 8, c. 6, which have been

[x] 2 Keb. 553, 555. Salk. 596, 597. 6 Mod. 11, 60, 101.

[y] Bro. Abr. tit. *Recognizance*, 8–14, 21.

[z] Stat. 29 Car. II. c. 3. See page 161.

(86) See 6 T. R. 303; 1 Barn. & Ald. 214. And by the statute 8 & 9 Will. 3, c. 11, the remedy on a bond or penalty to secure the performance of any covenant or agreement is limited at law (as it always was in equity) to the actual amount of the damages to be assessed by a jury. (See 6 East, 550; 5 B. & Ad. 40; 4 Moo. & P. 21).

As to the difference between a penalty and a stipulation for liquidated damages, see 3 Moo. & P. 425; 7 Scott, 364; 3 Mee. & W. 545.

already explained[a], and shewn to be a charge upon real property[87].

3. A defeazance, on a bond, or recognizance, or judgment recovered, is a condition, which, when performed, defeats or undoes it, in the same manner as a defeazance of an estate before mentioned. It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed[b]. This, like the condition of a bond, when performed, discharges and disincumbers the estate of the obligor. 3. Defeazance.

These are the principal species of deeds or matter *in pais*, by which estates may be either conveyed or at least affected. Among which the conveyances to uses are by much the most frequent of any; though, in these, there is certainly one palpable defect, the want of sufficient notoriety; so that purchasors or creditors cannot know with any absolute certainty, what the estate and the title to it in reality are, upon which they are to lay out or to lend their money. In the antient feodal method of conveyance (by giving corporal seisin of the lands), this notoriety was in some measure answered; but all the advantages resulting from thence are now totally defeated by the introduction of death-bed devises and secret conveyances: and there has never been yet any sufficient guard provided against fraudulent charges and incumbrances, since the disuse of the old Saxon custom of transacting all conveyances at the county-court, and entering a memorial of them in the chartulary or leger-book of some adjacent monastery[c], and the failure of the general register established by King Richard the first, for the starrs or mortgages made to Jews, in the *capitula de Judaeis*, of which Hoveden has preserved a copy. How far the establishment of a like general register, for deeds, and wills, and other acts affecting real property, would remedy this inconvenience, deserves to General observations. [343]

[a] See page 160. [b] Co. Litt. 237. 2 Sand. 47.
[c] Hickes *Dissertat. Epistolar.* 9.

(87) See the different recognizances fully treated of, 2 Saund. 68, and Id. Index, tits. *Recovery* and *Statute Merchant and Staple.*

Registry.

be well considered. In Scotland, every act and event regarding the transmission of property, is regularly entered on record [d]. And some of our own provincial divisions, particularly the extended county of York, and the populous county of Middlesex, have prevailed with the legislature [e] to erect such registers in their several districts. But, however plausible these provisions may appear in theory, it hath been doubted by very competent judges, whether more disputes have not arisen in those counties by the inattention and omissions of parties, than prevented by the use of registers [88].

[d] Dalrymple on Feodal Property, 262, &c.

[e] Stat. 2 & 3 Ann. c. 4. 6 Ann. c. 35. 7 Ann. c. 20. 8 Geo. II. c. 6.

(88) By these statutes, deeds and conveyances are void against subsequent purchasers or mortgagees, unless registered *before* the conveyances under which such purchasers or mortgagees claim; and no judgment, statute, or recognizance shall bind any lands in those counties, but from the time a memorial thereof is entered at the office. Thus, where there were two assignments of a lease, and the one last executed was registered first, it was held that the one first executed must be considered, in a court of law, as being fraudulent under the 7 Ann. c. 20, for default in registering, although the second assignee *knew* of the first assignment at the time his was executed. (5 B. & Al. 142). But a court of equity would relieve in such case, it having been decreed by Lord Hardwicke, that, if the subsequent purchaser by the registered deed had previous notice of the unregistered one, he shall not avail himself of his deed, but the first purchaser shall be preferred. But the registry itself of a deed is not held to be a notice of it to all the world. (1 Ves. 64; 3 Ves. 478; 1 Fonb. Eq. 25, n.; 3 Mad. 132; 1 You. & J. 117; 1 Sch. & Lef. 103; 2 Sim. & St. 221; 3 Sim. 301). These acts do not extend to copyhold estates, leases at rack-rent, or to any leases not exceeding twenty-one years, where the possession accompanies the lease, nor to the chambers in the inns of court.—[CHITTY.]

CHAPTER XXI.

OF ALIENATION BY MATTER OF RECORD.

Of assurances by matter of record.

ASSURANCES by *matter of record* are such as do not entirely depend on the act or consent of the parties themselves: but the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another; or of its establishment, when already transferred. Of this nature are, 1. Private acts of parliament. 2. The king's grants. 3. Fines. 4. Common recoveries.

I. Private acts of parliament.

I. Private *acts of parliament* are, especially of late years, become a very common mode of assurance. For it may sometimes happen, that, by the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances; (a confusion unknown to the simple conveyances of the common law); so that it is out of the power of either the courts of law or equity to relieve the owner. Or it may sometimes happen, that, by the strictness or omissions of family settlements, the tenant of the estate is abridged of some reasonable power, (as, letting leases, making a jointure for a wife, or the like), which power cannot be given him by the ordinary judges either in common law or equity. Or, it may be necessary, in settling an estate, to secure it against the claims of infants or other persons under legal disabilities, who are not bound by any judgments or decrees of the ordinary courts of justice. In these, or other cases of the like kind, the transcendent power of [345] parliament is called in, to cut the Gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate; to give its tenant reasonable powers; or to assure it to a purchasor, against the remote or latent claims of infants

or disabled persons, by settling a proper equivalent in proportion to the interest so barred (1). This practice was carried to a great length in the year succeeding the restoration; by setting aside many conveyances alleged to have been made by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as the noble historian expresses it [a], every man had raised an equity in his own imagination, that he thought was entitled to prevail against any descent, testament, or act of law, and to find relief in parliament: which occasioned the king, at the close of the session, to remark [b], that the good old rules of law are the best security; and to wish, that men might not have too much cause to fear, that the settlements which they make of their estates, shall be too easily unsettled when they are dead, by the power of parliament.

Acts of this kind are, however, at present carried on, in both houses, with great deliberation and caution; particularly in the house of lords, they are usually referred to two judges to examine and report the fact alleged, and to settle all technical forms. Nothing, also, is done without the consent, expressly given, of all parties in being, and capable of consent, that have the remotest interest in the matter: unless such consent shall appear to be perversely and without any reason withheld. And, as was before hinted, an equivalent in money or other estate is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by this act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever, except those whose consent is so given or purchased, and who are therein particularly named: though it hath been holden, that

[a] Lord Clar. Contin. 162. [b] Ibid. 163.

(1) Tenants for life sometimes obtain private acts of parliament to enable them to charge the inheritance for the amount of necessary repairs and improvements, which must enure to the benefit of the remainderman and reversioner. But parliament of course is the judge whether the proposed repairs and improvements are adequately beneficial to the amount to be charged upon the estate. As to the forms to be observed in the passing of private statutes, see ante, vol. 1, pp. 181 et seq.—[CHITTY.]

even if such saving be omitted, the act shall bind none but the parties [c].

A law, thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not, therefore, allowed to be a *publick*, but a mere *private* statute: it is not printed or published among the other laws of the session; it hath been relieved against, when obtained upon fraudulent suggestions [d]; it hath been holden to be void, if contrary to law and reason [e]; and no judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains, however, enrolled among the public records of the nation, to be for ever preserved as a perpetual testimony of the conveyance or assurance so made or established. [346]

II. The *king's grants* are also matter of public record [2]. For, as St. Germyn says [f], the king's excellency is so high II. The king's grants.

[c] Co. 138. Godb. 171.
[d] Richardson *v.* Hamilton, Canc. 8 Jan. 1733. McKenzie *v.* Stuart, Dom. Proc. 13 Mar. 1754.
[e] 4 Rep. 12.
[f] Dr. & Stud. b. 1, d. 8.

(2) With respect to the restrictions upon grants of lands by the crown, see statutes 1 Ann. st. 1, c. 7; 34 Geo. 3, c. 75; 38 Geo. 3, c. 60; 42 Geo. 3, c. 116; 47 Geo. 3, stat. 2, c. 24; 48 Geo. 3, c. 73; 52 Geo. 3, c. 161; 55 Geo. 3, c. 190; whereby all future *grants or leases* from the crown, for any longer term than thirty-one years, (see stat. 48 Geo. 3, c. 73, s. 3, which prohibits the future granting of crown lands for life; though lands of the duchy of Lancaster belonging to the king may be granted on building leases for ninety-nine years, or three lives, by stat. 52 Geo. 3, c. 161, s. 1), are declared to be void; except leases of land for building, which may be granted for any term not exceeding ninety-nine years from the date or making thereof, where the lessees agree to make erections of greater yearly value than the land, or where the greater part of the yearly value of the premises consists of buildings; (stat. 34 Geo. 3, c. 75, s. 3); and except leases of lands for gardens, &c. to be used with houses built either on crown lands or lands of other persons, proprietors, which may also be granted for any term not exceeding ninety-nine years to be computed from the date or making thereof, (stats. 48 Geo. 3, c. 73, s. 1; 52 Geo. 3, c. 161, s. 3), so as there be reserved upon every such grant or demise such annual rent as shall be deemed by the Lords of the Treasury, &c. a reasonable consideration for every such demise or grant, without taking any fine for the same; (stats. 34 Geo. 3, c. 75, s. 4; 52 Geo. 3, c. 161, s. 3); but a discretionary power is vested in the Treasury to ascertain the consideration, either in rent only, or partly in rent and partly in fine, in certain cases. (See stat. 48 Geo. 3, c. 73, s. 25). And if any such lease or grant be made

in the law, that no freehold may be given to the king, nor derived from him, but by matter of record. And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed, and enrolled; that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper or unlawful to be granted[3]. These grants, whether of lands, honours, liberties, franchises, or ought besides, are contained in charters, or letters *patent*, that is, open letters, *literae patentes:* so called because they are not sealed up,

Letters patent.

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to take effect in reversion, then the term or estate thereby to be granted, together with the term or estate in possession, must not exceed the respective times above mentioned. And see 1 & 2 Geo. 4, c. 52. By stat. 48 Geo. 3, c. 73, ss. 28, 29, (amended by stat. 52 Geo. 3, c. 161, s. 2), the chancellor, &c. of the duchy of Lancaster, and the surveyor-general of the crown lands, with consent of the Treasury, are empowered to *exchange* lands of the crown for lands of individuals, and they may pay or accept money for equalizing any such exchange. And by statutes 48 Geo. 3, c. 23, s. 11, and 52 Geo. 3, c. 161, s. 5; 54 Geo. 3, c. 170, s. 11, the Lords of the Treasury may *alienate* small parcels of crown lands intermixed with lands of individuals; but in all cases of such exchange or sale, the lands of the crown, and that of individuals to be given in exchange, must be previously surveyed and valued on oath by practical surveyors, to be appointed by the commissioners of woods, &c. (Stat. 52 Geo. 3, c. 161, s. 6). By stat. 34 Geo. 3, c. 75, the sale of *fee-farm and other unimprovable rents* is directed; and by statutes 38 Geo. 3, c. 60; 42 Geo. 3, c. 116; and 48 Geo. 3, c. 73, s. 11, the surveyor-general is empowered to sell *such manors or lordships* belonging to the crown as consist of manorial rights and quit-rents, and other property of an unproductive nature. As to the disposition of private property belonging to the king, see Thomas, Co. Lit. vol. 1, p. 66, n. (B); and as to grants of lands escheated, see Thomas, Co. Lit. vol. 2, p. 194, n. 15.; and 39 & 40 Geo. 3, c. 88; 47 Geo. 3, stat. 2, c. 24; and 59 Geo. 3, c. 94.

The stat. 34 Geo. 3, c. 75, s. 8, enacts, that, before any grant or lease of crown lands is made, a survey of the premises, and an estimate of the improved annual value thereof, shall be made and certified on oath by practical surveyors, appointed by the Lords of the Treasury, or the surveyor-general of the land revenues of the crown, unless where the premises are of a known, fixed, and unimprovable value, or where, from the nature of the premises, the value cannot be ascertained by means of a survey, or the value thereof is so inconsiderable as to render it inexpedient to incur that expense; in which cases leases may be granted or renewed without a survey. (Sect. 9).—[CHITTY.]

(3) See stats. 18 Hen. 6, c. 1; 27 Hen. 8, c. 11; 57 Geo. 3, c. 63; 2 Will. 4, c. 49; 1 Ves. jun. 112; 1 Ves. & B. 67; 1 Phill. 36; 3 Beav. 245; 4 Id. 563. The former existence of a grant from the crown may be presumed from circumstances, such as long enjoyment, &c. (Cowp. 102; 11 East, 488).

but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes; which, therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs *close, literae clausae,* and are recorded in the *close-rolls,* in the same manner as the others are in the *patent-rolls.*

Writs close.

Grants, or letters patent, must first pass by *bill:* which is prepared by the attorney and solicitor-general, in consequence of a warrant from the crown; and is then signed, that is, superscribed at the top, with the king's own *sign manual,* and sealed with his *privy signet,* which is always in the custody of the principal secretary of state; and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, "*per ipsum regem,* by the king himself[g]." Otherwise, the course is to carry an extract of the bill to the keeper of the *privy seal,* who makes out a writ or warrant thereupon to the Chancery; so that the sign manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal: and in this last case the patent is subscribed, "*per breve de privato sigillo,* by writ of privy seal[h]." But there are some grants, which only pass through certain offices, as the admiralty or treasury, in consequence of a *sign manual,* without the confirmation of either the *signet,* the *great,* or the *privy* seal.

The practice in royal grants.

[347]

The *manner* of granting by the king does not more differ from that by a subject, than the *construction* of his grants, when made. 1. A grant made by the king, *at the suit of the grantee,* shall be taken most beneficially *for* the king, and *against* the party: whereas the grant of a subject is construed most strongly *against the grantor.* Wherefore, it is usual to insert in the king's grants, that they are made, not at the suit of the grantee, but "*ex speciali gratia, certa scientia, et mero motu regis;*" and then they have a more

Construction of royal grants.

[g] 2 Rep. 176. 9 Rep. 18. [h] Ibid. 2 Inst. 555.

liberal construction[i] 4. 2. A subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted[j]: and if a feoffment of land was made by a lord to his villein, this operated as a manumission[k]; for he was otherwise unable to hold it. But the king's grant shall not enure to any other intent than that which is precisely expressed in the grant. As, if he grants land to an
[348] alien, it operates nothing; for such grant shall not also enure to make him a denizen, that so he may be capable of taking by grant[l]. 3. When it appears, from the face of the grant, that the king is mistaken, or deceived, either in matter of fact or matter of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law; in any of these cases the grant is absolutely void[m]. For instance, if the king grants lands to one and his *heirs male*, this is merely void: for it shall not be an estate-tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue: neither is it a fee-simple, as in common grants it would be; because it may reasonably be supposed, that the king meant to give no more than an estate-tail[n]: the grantee is therefore (if any thing) nothing more than tenant at will[o] 5. And to prevent deceits of the king, with regard to the value of the estate granted, it is particularly provided by the statute 1 Hen. IV. c. 6, that no grant of his shall be good, unless, in the grantee's petition for them, express mention be made of the real value of the lands.

[i] Finch. L. 100. 10 Rep. 112.
[j] Co. Litt. 56.
[k] Litt. § 206.
[l] Bro. Abr., tit. *Patent*, 62. Finch. L. 110.
[m] Freem. 172. [2 Jac. & W. 342.]
[n] Finch. 101, 102.
[o] Bro. Abr., tit. *Estates*, 34; tit. *Patents*, 104. Dyer, 270. Dav. 45.

(4) Royal grants for valuable consideration are also liberally construed in favour of the grantee. (Com. Dig. *Grant*; (G. 12); 6 Rep. 6 a).

(5) See 2 Moo. & P. 625.

III. We are next to consider a very usual species of assurance, which is also of record, viz. a *fine* of lands and tenements. In which it will be necessary to explain, 1. The *nature* of a fine; 2. Its several *kinds;* and 3. Its *force* and *effect*[6]. III. Fines.

1. A fine is sometimes said to be a feoffment of record[p]: though it might with more accuracy be called an acknowlegement of a feoffment on record. By which is to be understood, that it has at least the same force and effect with a feoffment, in the conveying and assuring of lands: though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisin is not necessary to be actually given; the supposition and acknowlegement thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question become, or are acknowleged to be, the right of one of the parties[q]. In its original it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security. 1. Nature of a fine. [349]

A fine is so called because it puts an *end,* not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Or, as it is expressed in an antient record of parliament[r], 18 Edw. I. "*Non in regno Angliæ providetur, vel est, aliqua securitas major vel solennior, per quam aliquis statum certiorem habere possit, neque ad statum suum verificandum aliquod solennius testimonium producere, quam finem in curia domini regis levatum: qui quidem finis sic vocatur, eo quod finis et consummatio*

[p] Co. Litt. 50. [q] Ibid. 120. [r] 2 Roll. Abr. 13.

(6) Although fines or recoveries can no longer be levied or suffered, a knowledge of their nature and operation is still nearly as important as it was while they were in use, as well for the understanding of the new forms of assurance, as for determining the effect of past transactions, upon which questions may continue to arise for an indefinite time.

omnium placitorum esse debet, et hac de causa providebatur." Fines, indeed, are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil[s] and Bracton[t] in the reigns of Henry II. and Henry III., as things then well known and long established; and instances have been produced of them even prior to the Norman invasion[u]. So that the statute 18 Edw. I., called *modus levandi fines*, did not give them original, but only declared and regulated the manner in which they should be levied, or carried on. And that is as follows:

Mode of levying fines. First, præcipe.

[350]

1. The party to whom the land is to be conveyed or assured, commences an action or suit at law against the other, generally an action of covenant[v], by suing out a writ or *praecipe*, called a writ of covenant[w]: the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king, by antient prerogative, a *primer fine*, or a noble for every five marks of land sued for; that is, one-tenth of the annual value[x]. The suit being thus commenced, then follows,

Secondly, the leave to agree

2. The *licentia concordandi*, or leave to agree the suit[y]. For, as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without licence, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another fine due to the king by his prerogative, which is an antient revenue of the crown, and is called the *king's silver*, or sometimes the *post fine*, with respect to the *primer fine* before-mentioned. And it

[s] L. 8, c. 1.

[t] L. 5, t. 5, c. 28.

[u] Plowd. 369.

[v] A fine may also be levied on a writ of *mesne*, of *warrantia chartae*, or *de consuetudinibus et servitiis*. (Finch. L. 278).

[w] See Appendix, No. IV. § 1.

[x] 2 Inst. 511.

[y] Appendix, No. IV. § 2. In the times of strict feodal jurisdiction, if a vasal had commenced a suit in the lord's court, he could not abandon it without leave, lest the lord should be deprived of his perquisites for deciding the cause. (Robertson, Cha. V. i. 31).

is as much as the *primer fine*, and half as much more, or ten shillings for every five marks of land; that is, three-twentieths of the supposed annual value [z].

3. Next comes the *concord*, or agreement itself[a], after leave obtained from the court: which is usually an acknowlegement from the deforciants (or those who keep the other out of possession) that the lands in question are the right of the complainant. And from this acknowlegement, or recognition of right, the party levying the fine is called the *cognizor*, and he to whom it is levied, the *cognizee*. This acknowlegement must be made either openly in the court of Common Pleas, or before the lord chief justice of that court, or else before one of the judges of that court, or two or more commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem;* which judges and commissioners are bound by statute 18 Edw. I. st. 4, to take care that the cognizors be of full age, sound memory, and out of prison. If there be any feme covert among the cognizors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband [7]. Thirdly, the concord or agreement. [351]

[z] 5 Rep. 39. 2 Inst. 511. Stat. 32 Geo. II. c. 14.
[a] Appendix, No. IV. § 3.

(7) "A third effect of fines is, passing the estates and interests of married women in the inheritance or freehold of lands and tenements. Our common law bountifully invests the husband with a right over the whole of the wife's personalty, and entitles him to the rents and profits of her real estate during the coverture. It further gives him an estate for his own life in her inheritance, if the husband is actually in possession, and there is born any issue of the marriage capable of inheriting. But the same law which confers so much on the husband will not allow her, whilst a feme-covert, to enlarge the provision for him out of her property, or to strip herself of any claims which the law gives her on his. On the contrary, jealous of his great authority over her, and fearful of his using compulsion, it creates a disability in her to give her consent to any thing which may affect her right or claims after the coverture, and makes all acts of such a tendency absolute nullities. By the rigour of the ancient law we take this rule to have been so universally applicable, that a married woman could in no case bind herself or her heirs by any direct mode of alienation. But accident gave birth to two indirect modes, namely, by fines and common recoveries. Though it might be proper to incapacitate the wife from being influenced by the husband to prejudice herself by any conveyances or agreements during the coverture, yet justice to others required, that such as might have any claim on the wife's freehold or inheritance should not be forced to postpone their suits till the marriage was determined; for if they should, then, to use the words of Bracton, in explaining why the husband's infancy

By these acts all the essential parts of a fine are completed: and, if the cognizor dies the next moment after the fine is acknowleged, provided it be subsequent to the day on which the writ is made returnable[b], still the fine shall

[b] Comb. 71.

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would not warrant the parol to demur, in a suit for the wife's land, *mulier implacitata de jure suo si propter minorem ætatem viri posset differre judicium, ita posset quælibet mulier in fraudem nubere.* (Bract. lib. 5, tract. 5, c. 21, fo. 423 a). Probably it was on this principle the common law allowed a judgment against husband and wife, in a suit for her land, to be as conclusive as if given against a feme-sole; which was carried so far, that, till the statute of Westminster the second, even judgment against them, on default in a *possessory* action for the wife's freehold, drove the wife, after the husband's death, to a writ of right to recover her land. (2 Inst. 342). From enabling the husband and wife to defend her title, and making the judgment on such defence to be conclusive, permitting them to compound the suit by a final agreement of record, in the same manner as other suitors, was no great or difficult transition, more especially when it is considered, that, in the case of femes-covert, fines are never allowed to pass, without the court's secret examination of them apart from their husbands, to know whether their consent is the result of a free choice, or of the husband's compulsive influence. Such, we conceive, is the true source, whence may be derived the present force of fines and common recoveries, as against the wife who joins in them; for whatever, in point of bar and conclusion, was their effect, when in suits really *adverse*, of course attended them when they were *feigned*, and in that form gradually rose into modes of alienation, or, as the more usual phrase is, *common assurances*. The conjecture we have thus hazarded, to illustrate how it happens, that a married woman may alienate her real rights by fine, though not by any instrument or act strictly and nominally a conveyance, leads to proving that the common notion of a fine's binding femes-covert merely by reason of the secret examination of them by the judges is incorrect. If the secret examination of itself was so operative, the law would provide the means of effectually adding that form to ordinary conveyances, and so make them conclusive to femes-covert equally with a fine. But it is clearly otherwise; and except in the case of conveyances by custom, there must be a *suit* depending for the freehold or inheritance, or the examination being extra-judicial is ineffectual. In the Second Institute, Lord Coke represents this to be the general law, and amongst many authorities cited to prove it, refers to a case of Hen. VII., reported by Keilway, in which, whether the examination of a feme-covert, on the enrolment of a bargain and sale to the king, sufficed to bind her, was largely debated. (2 Inst. 673; Keilw. 4 a to 20 a). The just explanation therefore of the subject is, that the pendency of a real action for the freehold of the land, in consequence of previously taking out an original writ, (without which preliminary, even at this day, a fine is a nullity), should be deemed the primary cause of the fine's binding a feme-covert, and that the secret examination of her, on taking the acknowledgment of the fine, is only a secondary cause of this operation." (Hargr. Co. Lit. 121. n. See 1 Phill. 14).

be carried on in all its remaining parts: of which the next is,

4. The *note* of the fine[c]; which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land[8], and the agreement. This must be enrolled of record in the proper office, by direction of the statute 5 Hen. IV. c. 14. Fourthly, the note of the fine.

5. The fifth part is the *foot* of the fine, or conclusion of it: which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowleged or levied[d]. Of this there are indentures made, or engrossed, at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus, "*haec est finalis concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law. Fifthly, the foot or conclusion of the fine.

By several statutes still more solemnities are superadded, in order to render the fine more universally public, and less liable to be levied by fraud or covin. And, first, by 27 Edw. I. c. 1, the note of the fine shall be openly read in the court of Common Pleas, at two several days in one week, and during such reading all pleas shall cease. By 5 Hen. IV. c. 14, and 23 Eliz. c. 3, all the proceedings on fines, either at the time of acknowlegement, or previous, or subsequent thereto, shall be enrolled of record in the court of Common Pleas. By 1 Ric. III. c. 7, confirmed and enforced by 4 Hen. VII. c. 24, the fine, after engrossment, shall be openly read and proclaimed in court (during which all pleas shall cease) sixteen times; *viz.* four times in the term in which it is made, and four times in each of the three succeeding terms; which is reduced to once in each term by 31 Eliz. c. 2; and these proclamations are endorsed on the back of the record[e 9]. It is also enacted by 23 Eliz. c. 3, [532] Sixthly, proclamation, record, and publication of fines.

[c] Appendix, No. IV. § 4. [d] Ibid. § 5. [e] Ibid. § 6.

(8) The fine mentioned only the parish, vill, or township in which the lands are situate, and the quantity and quality of the lands, as "so many acres of pasture, so many houses," &c.; and, for further particularity, a deed, referring to the fine, was always necessary. (2 Vent. 32; 1 Taunt. 234). As there was a separate writ for each county, an estate lying in two counties required two fines. (1 Taunt. 538).

(9) As to the utility of proclamations, see 1 Prest. 214 et seq.; 2

that the chirographer of fines shall every term write out a table of the fines levied in each county in that term, and shall affix them in some open part of the court of Common Pleas all the next term: and shall also deliver the contents of such table to the sheriff of every county, who shall, at the next assises, fix the same in some open place in the court, for the more public notoriety of the fine.

2. Several kinds of fines.

1. Fine come ceo.

2. Fines, thus levied, are of four kinds [10]: 1. What in our law French is called a fine "*sur cognizance de droit, come ceo que il ad de son done;*" or, a fine upon acknowlegement of the right of the cognizee, as that which he hath of the gift of the cognizor [f]. This is the best and surest kind of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment or gift in possession, to have been made by him to the plaintiff. This fine is therefore said to be a feoffment of record; the livery, thus acknowleged in court, being equivalent to an actual livery: so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant or cognizor acknowleges, *cognoscit*, the right to be in the plaintiff, or cognizee, as that which he hath *de son done*, of the proper gift of himself, the cognizor. 2. A fine "*sur cognizance de droit tantum,*" or, upon acknowlegement of the right merely; not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a *reversionary* interest, which is in the cognizor. For of such reversions there can be no feoffment, or donation with livery, supposed; as the possession during the particular estate belongs to a third

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2. Fine tantum.

[f] This is that sort, of which an example is given in the Appendix, No. IV.

Saund., Index, tit. *Fines*. Fines were effectual as *conveyances*, without proclamations; but, without that ceremony, did not operate to bar issue, nor gain any title by non-claim; therefore, fines levied in courts of ancient demesne, and such other courts as have not the power of making proclamations, were good as conveyances only, for no fine but a fine with proclamations is within the statute 4 Hen. 7, which enacts that a fine with proclamations shall bar an estate-tail. (1 Salk. 339; 1 Saund. 258 a, note 8).—[CHITTY.]

(10) See 1 Prest. on Conv. 201.

person [g]. It is worded in this manner: "that the cognizor acknowleges the right to be in the cognizee; and grants for himself and his heirs that the reversion, after the particular estate determines, shall go to the cognizee" [h]. 3. A fine "*sur concessit*" is where the cognizor, in order to make an end of disputes, though he acknowleges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this may be done reserving a rent, or the like: for it operates as a new grant [i] [11]. 4. A fine "*sur done, grant, et render*," is a double fine, comprehending the fine *sur cognizance de droit come ceo, &c.*, and the fine *sur concessit:* and may be used to create particular limitations of estate: whereas the fine *sur cognizance de droit come ceo, &c.* conveys nothing but an absolute estate, either of inheritance or at least of freehold [j]. In this last species of fine, the cognizee, after the right is acknowleged to be in him, grants back again, or renders, to the cognizor, or perhaps to a stranger, some other estate in the premises [12]. But, in general, the first species of fine, *sur cognizance de droit come ceo, &c.*, is the most used, as it conveys a clean and absolute freehold, and gives the cognizee a seisin in law, without any actual livery; and is therefore called a fine executed, whereas the others are but executory.

3. Fine sur concessit.

4. Fine sur done, grant, et render.

3. We are next to consider the *force* and *effect* of a fine. These principally depend, at this day, on the common law, and the two statutes, 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36. The antient common law, with respect to this point,

3. Force and effect of a fine.

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[g] Moor. 629.
[h] West. Symb. page 2, § 95.
[i] West. page 2, § 66.
[j] Salk. 340.

(11) The fine come ceo was most properly used for the transfer of estates of fee-simple in possession; but it was often employed to operate upon remainders or reversions. The fine sur concessit was sometimes used to pass a fee-simple, but more generally to create an estate for life or years, and was thought more capable of a restricted operation than the other species of fine.

(12) The estate so rendered made the conusor a new purchaser as much as a feoffment and re-feoffment at common law. Thus, if before the fine was levied the estate had descended to the conusor from his ancestors *ex parte maternâ*, it became afterwards descendible in the paternal line. (1 Salk. 337; Dy. 237 b; Co. Litt. 316). This last species of fine had become obsolete in practice long before the abolition of fines and recoveries generally; and the fine tantum was not often resorted to.

is very forcibly declared by the statute 18 Edw. I., in these words: "And the reason, why such solemnity is required in the passing of a fine, is this: because the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas, the day of the fine levied; unless they put in their claim on the foot [k] of the fine within a year and a day." But this doctrine, of barring the right by *non-claim*, was abolished for a time by a statute made in 34 Edw. III. c. 16, which admitted persons to claim and falsify a fine, at any indefinite distance [l]; whereby, as Sir Edward Coke observes [m], great contention arose, and few men were sure of their possessions, till the parliament, held 4 Hen. VII., reformed that mischief, and excellently moderated between the latitude given by the statute and the rigour of the common law. For the statute then made [n], restored the doctrine of non-claim; but extended the time of claim. So that now, by that statute, the right of all strangers whatsoever is bound, unless they make claim, by way of action or lawful entry, not within *one* year and a day, as by the common law, but within *five* years after proclamations made: except feme coverts, infants, prisoners, persons beyond the seas, and such as are not of whole mind; who have five years allowed to them and their heirs, after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind [13].

Bar by non-claim, stat. 34 Ed. 3, c. 16.

Stat. 4 Hen. 7, c. 24.

[k] *Sur la pie*, as it is in the Cotton MS., and not *pur le pais*, as printed by Berthelet, and in 2 Inst. 511. There were then four methods of claiming, so as to avoid being concluded by a fine: 1. By action. 2. By entering such claim on the record at the *foot* of the fine. 3. By entry on the lands. 4. By continual claim. 2 Inst. 518. The second is not now in force under the statute of Henry VII.

[l] Litt. § 441.

[m] 2 Inst. 518.

[n] 4 Hen. VII. c. 24. See page 118.

(13) The stat. 4 Hen. 7, c. 24, after directing the proclamations, proceeds, "and the said proclamations so had and made, the said fine to be a final end, and *conclude as well privies as strangers* to the same, except women covert, (other than have been parties to the said fine), and every person then being within the age of twenty-one years, in prison, or out of this realm, or not of whole mind at the time of said fine levied, *not parties to such fine;* and saving to every person or persons, and to their heirs, *other than the par-*

It seems to have been the intention of that politic prince, king Henry VII., to have covertly by this statute extended

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ties in the said fine, such right, title, claim, and interest, as they have to or in the said lands, &c. [at] the time of such fine ingrossed, *so that they pursue their title, claim, or interest by way of action or lawful entry within five years* next after the said proclamations had and made; and also, saving to all other persons such action, right, title, claim, and interest, in or to the said lands, &c. as first shall grow, remain, descend, or come to them after the said fine ingrossed and proclamations made, by force of any gift in the tail, or by any other cause or matter had and made before the said fine levied, so that they take their action, or pursue their said right and title, according to the law within five years next after such action, right, &c. to them accrued, descended, remained, fallen, or come; and if the same persons, at the time of such action, &c., accrued, &c., be covert de baron, or within age, in prison, or out of this land, or not of whole mind, then it is ordained that their action, right, and title be reserved and saved to them and their heirs [see 2 H. Bl. 584; 4 T. R. 300; 4 Taunt. 830] unto the time they come and be at their full age of twenty-one years, out of prison, within this land, uncovert and of whole mind, so that they or their heirs take their said actions or their lawful entry according to their right and title within five years next after that they come and be at their full age, &c., and the same actions pursue, or other lawful entry take, according to the law, and &c., [a similar limitation of the remedy to five years after the cesser of any disability existing at the time of levying the fine]; saving to every person or persons, *not party or privy to* the said fine, their exception to avoid the same fine by that, that those who were parties to the fine, *nor any of them*, [see Br. Ab. Fine, 12; Burr. 95], nor no person or persons *to their use*, nor to the use of any of them, [this was before the Statute of Uses, see Dy. 215], had nothing in the lands and tenements comprised in the said fine at the time of the said fine levied. And that every fine, which hereafter shall be levied in any of the king's courts, of any manors, lands, &c., after the manner, use, and form that fines have been levied afore the making of this act, be of like force, effect, and authority as fines so levied be or were afore the making of this act, this act or any other act in this present parliament made or to be made notwithstanding; and every person shall be at liberty to levy any fine hereafter at his pleasure, whether he will, after the form contained and ordained in and by this act, or after the manner and form aforetime used."

The following is a summary of some of the principal effects of a fine, according to its nature. It operated as a bar by non-claim, in the manner mentioned in the text, only when levied by a party seised rightfully or wrongfully of an estate of freehold, and duly proclaimed; and this bar extended to strangers as well as to parties and privies. (Stat. 4 Hen. 7, c. 24; 7 Scott, 59). But a fine did not bar any estate which was not, either previously, or by the operation of the fine itself, divested out of the owner, and turned to a right. (9 Rep. 106 a). If the party levying the fine had an actual seisin, whether rightfully or wrongfully, and whether for an estate of fee-simple or for a less estate, the fine operated, by disseisin if necessary, to the extent of its declared intention; but if the party to the fine was not seised at all, either from want of all right, or by having been disseised, the fine had no operation upon the seisin; although, if the conusor has a vested remainder or reversion, it passed it. (Cro. Car.

fines to have been a bar of estates-tail, in order to unfetter the more easily the estates of his powerful nobility, and lay

156; Co. Litt. 298). So that if A. was tenant for life, remainder to B. for life or in tail, remainder to C. in fee, and B. levied a fine to a stranger, or was conusee to a stranger's fine, this did not disturb the seisin of A., and consequently did not divest the remainder of C., who, therefore, could never be barred by the operation of the fine and non-claim. (2 N. R. 1; 3 Atk. 135; 5 Man. & S. 326). So, the fine of one of two joint tenants or tenants in common did not divest the estate of the other. (1 Salk. 285; 2 Id. 423; Cr. El. 1640). In such cases, to give effect to a fine, a previous disseisin by feoffment was resorted to. When levied by tenant in tail, in possession, remainder, reversion, or possibility, and duly proclaimed, it barred the issue in tail, but not those in remainder or reversion; nor was it a bar unless the entail had been created before the fine levied. (32 Hen. 8, c. 36; 10 Rep. 50 a). When levied by tenant in tail, seised of a corporeal hereditament in possession, (by himself or by his termor), it was a *discontinuance* of those in remainder or reversion, (that is to say, it destroyed their right of entry, and put them to their formedon or real action). If proclaimed, it barred the issue in tail; if not proclaimed, it discontinued them also. (Co. Litt. 327. b.; 1 H. Bl. 269; 1 B. & Cr. 241; 4 B. & Ad. 283; 1 Cr. & J. 535; 7 Mee. & W. 102). So that if A., tenant in tail in possession, with remainder to B., levied a fine come ceo, without proclamations, to S. and his heirs, this was a discontinuance of his own issue in tail, and of the remainderman; if with proclamations, a bar of the issue, and a discontinuance of the remainderman. If he first bargained and sold the lands to S. in fee, this innocent conveyance passed the seisin out of himself without effecting a discontinuance; and if upon that he levied a fine with proclamations, the issue were barred, and the remainderman not discontinued. (Touchst. 27). If made without proclamations, but with warranty, by one who claimed or expected an estate tail, but was not seised thereof, it effected what was equivalent to a discontinuance of the issue in tail, but not of the remainderman, because, had the issue in tail (who were bound by the warranty and assets in fee-simple) been allowed to enter, the estate to which the warranty was annexed would have determined, and thus the benefit of the warranty would have been lost. (Litt. ss. 598. 601; 10 Rep. 96 a; 1 Cr. & J. 528). If levied with or without proclamations by any person, whether entitled to any estate in the land or not, it estopped the parties (including married women) and privies from pleading or insisting that the parties had no estate at the time, or that it did not pass according to the terms of the fine. (27 Ed. 1, st. 1, c. 1; 3 Rep. 87; 2 B. & Al. 242). And this estoppel (which could not be taken advantage of by strangers) bound the heirs in tail, notwithstanding the Statute de Donis, though the fine was not proclaimed; for that statute merely preserved to the issue his formedon, so that he might insist, that, by virtue of that statute, he was not barred of his action, and yet could not aver anything contrary to the fine itself. (1 Leon. 83; 3 Rep. 89; 1 Cr. & J. 528). The privies who are bound by a fine are their heirs or their grantees by conveyance subsequent to the fine. Heirs claiming in fee, being bound by the estoppel, are bound altogether; but heirs in tail, though as much estopped as other heirs, had their formedon preserved by the Statute de Donis, so far as that statute was not controlled by the stat. 32 Hen. 8, c. 36. "Every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason, that regularly a stranger shall

them more open to alienations; being well aware that power will always accompany property. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar, (which they were expressly declared *not* to be by the statute *de donis*), the statute 32 Hen. VIII. c. 36, was thereupon made; which removes all difficulties, by declaring that a fine levied by any person of full age, to whom or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail: unless the fine be levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestor, assigned to her in tail for her jointure[o]; or unless it be of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown.

Statute of Fines, 32 Hen. 8, c. 36.

From this view of the common law, regulated by these

[o] See statute 11 Hen. VII. c. 20.

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neither take advantage nor be bound by the estoppel; privies in blood, as the heir, privies in estate, as the feoffee, lessee, &c., privies in law, as the lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come under by act of law or in the post, shall be bound and take advantage of estoppels." (Co. Litt. 352. a.; Bro. Ab. *Estoppel*, 216).

But though strangers shall not directly aver and take advantage of estoppels, yet that which originally was merely an estoppel may, by circumstances, acquire greater efficacy, so as to be available by a stranger. Thus, if a contingent remainderman or expectant heir levied a fine, he was estopped from averring his want of present interest; but when the contingency happened, the estate fed the estoppel, and *passed* under the fine, which thenceforth became, to all intents, as operative as if the contingency had happened before it was levied. (Pollexf. 54; 2 P. Wms. 372; 8 B. & Cr. 497; 10 Id. 181). The notion, that a fine *extinguished* the rights and contingent interests and powers of the conusor, seems to be now overruled, at least so far as regards fines in which, or in the deeds leading or declaring the uses of which, a contrary intention is apparent. (Id.; M'Clel. & Y. 58). Where such an effect was not contrary to the apparent intention, however, a fine operated as an extinguishment or release of all the conusor's rights, interests, and powers. It was formerly supposed, that if A. was disseised by B., and then levied a fine to C., this fine, being inoperative upon the seisin, would have *extinguished* A.'s right for the benefit of B.; but this may well be doubted after the modern cases. (See too, 12 East, 154, n.)

A fine also operated as a confirmation of all prior defeasible estates and charges made by the conusor, and when levied by a tenant for life, in tail after possibility of issue extinct, or for years, or by a copyholder, and not confined in its nature and operation to such estate as the conusor might lawfully pass, it occasioned a forfeiture, of which the remainderman, reversioner, or lord might take advantage or not at his option. (Cr. El. 254; 8 East, 553).

statutes, it appears, that a fine is a solemn conveyance on record from the cognizor to the cognizee, and that the persons bound by a fine are *parties, privies,* and *strangers.*

Parties to a fine.

The *parties* are, either the cognizors, or cognizees, and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture [14]. And, indeed, as this is almost the only act that a *feme-covert,* or married woman, is permitted by law to do, (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband) [15], it is, therefore, the usual and almost the only safe method, whereby she can join in the sale, settlement, or incumbrance, of any estate.

Privies to a fine.

Privies to a fine are such as are any way related to the parties who levy the fine, and claim under them by any right of blood, or other right of representation. Such as are the heirs general of the cognizor, the issue in tail, since the statute of Henry the eighth, the vendee, the devisee, and all others who must make title by the persons who levied the fine. For the act of the ancestor shall bind the heir,

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and the act of the principal his substitute, or such as claim under any conveyance made by him subsequent to the fine so levied [p].

Strangers to a fine.

Bar of strangers by non-claim.

Strangers to a fine are all other persons in the world, except only parties and privies. And these are also bound by a fine, unless, within five years after proclamations made, they interpose their claim; provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea: and persons who are thus incapacitated to prosecute their rights, have five years allowed them to put in their claims after such impediments are removed [16]. Persons, also, that

[p] 3 Rep. 87.

(14) A fine levied by a lunatic was valid at law, though in equity relief might have been had. (2 Vern. 678; Toth. 101; 4 Rep. 124; 12 Rep. 124; 1 Per. & D. 126).

(15) Mr. Hargrave shews that this is not the true reason, ante, 351, note 7.

(16) In the case of a married woman, the husband was barred after five years

have not a present, but a future interest only, as those in remainder or reversion, have five years allowed them to claim in, from the time that such right accrues [q] [17]. And if within that time they neglect to claim, or (by the statute 4 Ann. c. 16) if they do not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim. Stat. 4 Ann. c. 16.

But, in order to make a fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers, by a mere confederacy, might, without any risque, defraud the owners by levying fines of their lands; for, if the attempt be discovered, they can be no sufferers, but must only remain *in statu quo:* whereas, if a tenant for life levies a fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner [r], if claimed in proper time. It is not, therefore, to be supposed that such tenants will frequently run so great a hazard; but if they do, and the claim is not duly made within five years after their respective terms expire [s], the estate is for ever barred by it. Yet, where a stranger, whose presumption cannot thus be punished, officiously interferes in an estate which in nowise belongs to him, his fine is of no effect; and may at any time be set aside (unless by such as are parties or privies thereunto) [t] by pleading that "*partes finis nihil habuerunt*" [18]. And, even if a tenant for years, who hath only a chattel interest, and no freehold in the land, levies a fine, it operates nothing, but is liable to be defeated by the same plea [u]. Wherefore, Fine void unless the parties have a freehold interest in the lands.

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[q] Co. Litt. 372. [r] Ibid. 251. [s] 2 Lev. 52.
[t] Hob. 334. [u] 5 Rep. 123. Hardr. 401.

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from the levying of the fine, and, consequently, the wife being unable to sue without him during the coverture, she was barred for the remainder of the coverture; but on that disability ceasing, she had a new term of five years within which to prosecute her right. (4 Per. & Dav. 285).

(17) And that even where their reversion is expectant upon a mere term of years, unless indeed the fine has been levied by one who has ousted the termor, and thus claims adversely to him. (9 Rep. 105 b; 4 Per. & D. 286).

(18) See 7 Scott, 59; 1 Cr. & J. 535.

when a lessee for years is disposed to levy a fine, it is usual for him to make a feoffment first, to displace the estate of the reversioner [x], and create a new freehold by disseisin [19]. And thus much for the conveyance or assurance by fine: which not only, like other conveyances, binds the grantor himself, and his heirs; but also all mankind, whether concerned in the transfer or no, if they fail to put in their claims within the time allotted by law [20].

IV. Common recovery.

IV. The fourth species of assurance, by matter of record, is a *common recovery*. Concerning the original of which it was formerly observed [y], that common recoveries were invented by the ecclesiastics to elude the statutes of mortmain; and afterwards encouraged by the finesse of the courts of law in 12 Edw. IV. in order to put an end to all fettered inheritances, and bar not only estates-tail, but also remainders and reversions expectant thereon. I am now, there-

[x] Hardr. 402. 2 Lev. 52. [y] Pages 117, 271.

(19) This tortious act of the termor was a forfeiture of his term, which the reversioner might have taken advantage of (within five years) or not as he pleased. If he did not accept the forfeiture, the term subsisted for all purposes, and he had a new right at the expiration of the term; and in the mean time, if he could have procured the term to be vested in a trustee for himself, might have used it for his defence against the disseisor. (1 Wms. Saund. 319; 4 Per. & Dav. 285).

(20) It is not necessary to be *in possession* of the freehold in order to levy a fine; but if any one entitled to the inheritance, or to a remainder in tail, levied a fine, it will bar his issue and all heirs who derive their title through him. (Hob. 333). A fine by tenant in tail does not affect subsequent remainders, but it creates a base or qualified fee, determinable upon the failure of the issue of the person to whom the estate was granted in tail; upon which event the remainderman may enter. (2 Lord Raym. 778; 3 Burr. 704; 7 T. R. 276; 8 T. R. 211). If tenant in tail, with an immediate reversion in fee, levies a fine, the base fee merges in the reversion, and he thus gains a fee-simple, which will become liable to all the incumbrances of the ancestors from whom the estate-tail descended; as judgments, recognizances, and such leases as are void with respect to the issue in tail. This has frequently happened in practice, from such a person being ill advised to levy a fine, instead of suffering a recovery. (5 T. R. 108; 1 Cru. 274). A recovery suffered by any tenant in tail lets in all the incumbrances created by himself, which were defeasible by the issue in tail, and after the recovery they will follow the lands in the hands of a *bonâ fide* purchaser. (Pig. 120; 2 Cru. 287).—[CHRISTIAN.]

fore, only to consider, first, the *nature* of a common recovery; and, secondly, its *force* and *effect*.

1. And, first, the *nature* of it; or what a common recovery is. A common recovery is so far like a fine, that it is a suit or action, either actual or fictitious: and in it the lands are *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror. A recovery, therefore, being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding, I am greatly apprehensive that its form and method will not be easily understood by the student who is not yet acquainted with the course of judicial proceedings, which [358] cannot be thoroughly explained, till treated of at large in the third book of these commentaries. However, I shall endeavour to state its nature and progress, as clearly and concisely as I can; avoiding, as far as possible, all technical terms and phrases not hitherto interpreted. 1st. The nature of a common recovery.

Let us, in the first place, suppose David Edwards[z] to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding is to bring an action against him for the lands; and he accordingly sues out a writ, called a *praecipe quod reddat*, because those were its initial or most operative words, when the law proceedings were in Latin. In this writ the demandant Golding alleges that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into possession of it after one Hugh Hunt had turned the demandant out of it[a]. The subsequent proceedings are made up into a record or recovery roll[b], in which the writ and complaint of the demandant are first recited: whereupon the tenant appears, and calls upon one Jacob Morland, who is supposed, at the original purchase, to have warranted the title to the tenant; and thereupon he prays, that the said Jacob Morland may be called in to defend the title which he so warranted. This is called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland is called the *vouchee*. Upon Single voucher.

[z] See Appendix, No. V. [a] § 1. [b] § 2.

this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon Golding, the demandant, desires leave of the court to *imparl*, or confer with the vouchee in private; which is (as usual) allowed him. And soon afterwards the demandant, Golding, returns to court, but Morland, the vouchee, disappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoveror, to recover the lands in question against the tenant, Edwards, who is now the recoveree:
[359] and Edwards has judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty mentioned in the preceding chapter[c]. This is called the recompense, or *recovery in value*. But, Jacob Morland having no lands of his own, being usually the cryer of the court, (who, from being frequently thus vouched, is called the *common vouchee*), it is plain, that Edwards has only a nominal recompense for the lands so recovered against him by Golding; which lands are now absolutely vested in the said recoveror by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance in fee-simple, from Edwards, the tenant in tail, to Golding, the purchasor.

Double voucher. The recovery, here described, is with a *single* voucher only; but sometimes it is with *double*, *treble*, or farther voucher, as the exigency of the case may require. And, indeed, it is now usual always to have a recovery with double voucher at the least: by first conveying an estate of freehold to any indifferent person, against whom the *praecipe* is brought; and then he vouches the tenant in tail, who vouches over the common vouchee[d]. For, if a recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seised; whereas if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the lands recovered[e]. If Edwards therefore be tenant of the freehold in possession, and John Barker be tenant in tail in remainder, here Edwards doth first vouch Barker, and then Barker

[c] Page 301. [d] See Appendix, page xviii.
[e] Bro. Abr., tit. *Taile*, 32. Plowd. 8.

vouches Jacob Morland, the common vouchee; who is always the last person vouched, and always makes default: whereby the demandant, Golding, recovers the land against the tenant, Edwards, and Edwards recovers a recompense of equal value against Barker, the first vouchee; who recovers the like against Morland, the common vouchee, against whom such ideal recovery in value is always ultimately awarded. [360]

Supposed recompense from the common vouchee.

This supposed recompense in value is the reason why the issue in tail is held to be barred by a common recovery. For, if the recoveree should obtain a recompense in lands from the common vouchee, (which there is a possibility in contemplation of law, though a very improbable one, of his doing), these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail[f]. This reason will also hold with equal force, as to *most* remainder-men and reversioners; to whom the possibility will remain and revert, as a full recompense for the reality, which they were otherwise entitled to; but it will not *always* hold: and, therefore, as Pigot says[g], the judges have been even *astuti* in inventing other reasons to maintain the authority of recoveries. And, in particular, it hath been said, that, though the estate-tail is gone from the recoveree, yet it is not *destroyed*, but only *transferred;* and still subsists, and will ever continue to subsist (by construction of law) in the recoveror, his heirs and assigns: and, as the estate-tail so continues to subsist for ever, the remainders or reversions expectant on the determination of such estate-tail can never take place[21].

[f] Dr. & St. b. 1, dial. 26.

[g] Of com. recov. 13, 14.

(21) Fines and recoveries are now considered as mere forms of conveyances or common assurances, the theory and original principles of them being little regarded. Chief Justice Willes has declared, that "Mr. Pigot has confounded himself and every body else who reads his book, by endeavouring to give reasons for and explain common recoveries. I only say this," he adds, "to shew that when men attempt to give reasons for common recoveries, they run into absurdities, and the whole of what they say is unintelligible jargon and learned nonsense. They have been in use some hundreds of years, have gained ground by time, and we must now take them as they really are, common assurances." (1 Wils. 73).—[CHRISTIAN.]

The judges did not allow any criticism of the theory of common recoveries, that went the length of destroying their efficacy in toto; but no reasoning upon their rationale, if it stopped short of that boldness, was disregarded; and hence arose a variety

To such awkward shifts, such subtile refinements, and such strange reasoning, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute

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of nice distinctions, some of which, as to voucher, are important to be understood.

The writ was usually one of *entry sur disseisin en le post*, which supposed a disseisin, and that the tenant had no entry into the land but *after* the disseisin, without stating more particularly the origin of his title, and therefore allowing the tenant to vouch at large. (2 Inst. 154; Booth on Real Actions, 176). When the action was brought against the tenant in tail himself, he vouched the common vouchee, as having warranted to him *the title under which he was in possession, and, as the demandant asserted, wrongfully*. The vouchee, by confessing the warranty and making default, bound himself to give to the tenant in recompense other tenements to be held *for the same* estate or estates as those lost by the tenant, that is to say, the estate under which he was seised when the action was brought. This estate, in the case of a tenant in tail in possession with remainders or reversion over, was the estate-tail, and also the remainders or reversion, which obviously depended on the same title as the entail; and these were barred by the recovery with single voucher. But if the tenant had been previously disseised, and had reacquired the seisin, without being remitted to his old estate, his voucher was necessarily founded on a supposed warranty of the new estate, and not of that of which he had been disseised; and the recompense must have followed the new estate and not the old one, of which, therefore, it was no bar. (*Taltarum's case*, 12 Edw. 4; 3 Rep. 58). And where the tenant was seised of a life estate, with a remainder to himself in tail, separated from his life estate by intermediate estates, his recovery with single voucher was no bar of the estate-tail. (6 Br. P. C. 338). For these reasons, and to avoid the possibility of any alteration having taken place in the estate of the tenant in tail, recoveries with single voucher fell into disuse, except under particular circumstances. (See Fearne, Posth. W. 335). With double voucher the case was very different. Here the tenant in tail had either never become actually seised, or he had transferred the seisin to another, that he might become tenant to the præcipe. The action being brought against the tenant of the freehold, he vouched the tenant in tail, who appearing and confessing the warranty, and undertaking to defend, was held to become in effect the defendant or tenant of the freehold, (so much so that he might take a release from the demandant (Co. Litt. 265. b.)); but tenant in a much more extensive sense he would have been if the action had been commenced against him. For by his warranty he was bound to make good the estate warranted out of every estate or right which was in him; and by submitting to defend in this action, he in effect submitted every estate and right which he had (except contingent and future estates) to the judgment. Having thus become defendant of all his estates and rights, he vouched the common vouchee to defend his title to them all; who, by undertaking to do so and failing, occasioned, in the first place, a judgment to go for the demandant in fee-simple, and in the next place, a judgment against himself, for recompense in respect of all the estates warranted by him, i. e. all the estates and rights which the tenant in tail had. (Salk. 571; 3 Rep. 5; Plowd. 2). Treble voucher was necessary, if at all, where a tenant in tail had created an entail derived out of his own estate in another, and both estates, being in different persons, were to be barred. Here it was prudent to vouch the

de donis. The design, for which these contrivances were set on foot, was certainly laudable; the unrivetting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth: but, while we applaud the end, we cannot but admire the means. Our modern courts of justice have indeed adopted a more manly way of treating the subject; by considering common recoveries in no other light than as the formal mode of conveyance, by which tenant in tail is enabled to aliene his lands [22]. But, since the ill consequences of fettered inheritances are now generally seen and allowed, and of course the utility and expedience of setting them at liberty are apparent, it hath often been wished that the process of this conveyance was shortened, and rendered less subject to niceties, by either totally repealing the statute *de donis;* which, perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations: or, by vesting in every tenant in tail of full age the same absolute fee-simple at once, which now he may obtain whenever he pleases, by the collusive fiction of a common recovery; though, this might possibly bear hard upon those in remainder or reversion by abridging the chances they would otherwise frequently have, as no recovery can be suffered in the intervals between term and term, which sometimes continue for near five months together: or lastly, by empowering the tenant in tail to bar the estate-tail by a solemn deed, to be made in term time, and enrolled in some court of record; which is liable to neither of the other objections, and is warranted not only by the usage of our American colonies, and the decisions of our own

Recoveries now regarded as common assurances.

[361]

puisne tenant in tail; and as the recompense recovered under his voucher would not follow the original estate-tail, it was of course necessary that the original tenant in tail should be vouched; and the regular course was, that the puisne tenant in tail, being vouched, should vouch the tenant of the original estate-tail, and that he should vouch the common vouchee. But it is not clear whether a voucher of the two tenants in tail jointly, followed by a joint voucher by them of the common vouchee, would not have been sufficient. (See 1 Prest. Conv. 127).

(22) "The truth is, that, like many other fictions of law invented for the purpose of promoting the enjoyment of property, the machinery will not bear a very critical examination; but, being once adopted, it is maintained for the benefit which it is found to confer." (Per Lord Lyndhurst, C., 1 Phill. 16).

courts of justice, which allow a tenant in tail (without fine or recovery) to appoint his estate to any *charitable* use [h], but also by the precedent of the statute [i] 21 Jac. I. c. 19, which, in case of a bankrupt tenant in tail, empowers his commissioners to sell the estate at any time, by deed indented and enrolled. And if, in so national a concern, the emoluments of the officers concerned in passing recoveries are thought to be worthy attention, those might be provided for in the fees to be paid upon each enrolment.

2. The force and effect of common recoveries.

2. The *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar, not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions [23] and limitations in tail, and of all remainders and reversions. But, by statute 34 & 35 Hen. VIII. c. 20, no recovery had against tenant in tail, of the king's gift, whereof the remainder or
[362] reversion is in the king, shall bar such estate-tail, or the remainder or reversion of the crown [24]. And by the statute 11 Hen. VII. c. 20, no woman, after her husband's death, shall suffer a recovery of lands settled on her by her husband, or settled on her husband and her by any of his ancestors [25]. And by statute 14 Eliz. c. 8, no tenant for life, of any sort, can suffer a recovery, so as to bind them in remainder or reversion [26]. For which reason, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is desirous to suffer a valid

[h] See page 376. [i] See page 286.

(23) Except, perhaps, a condition for re-entry on non-payment of a rent reserved by the donor of the estate-tail. (2 Salk. 570).

(24) See Co. Litt. 372; 1 W. Bl. 654; 6 Scott, 719.

(25) But the act did not prevent her levying a fine jointly with her husband, or after his death with the consent of the remainderman, such consent appearing on record, or by deed enrolled. (Cro. Jac. 474; Cruise on Recov. 160). See note (30) infra.

(26) But a recovery suffered by a tenant for life still amounts to a forfeiture, and, *in that way*, to a bar of any contingent remainders immediately expectant on the life estate. (7 Scott, 815).

recovery; either he, or the tenant to the *praecipe* by him made, must *vouch* the remainder-man in tail, otherwise the recovery is void: but if he does vouch such remainder-man, and he appears and vouches the common vouchee, it is then good; for, if a man be vouched and appears, and suffers the recovery to be had against the tenant to the *praecipe*, it is as effectual to bar the estate-tail as if he himself were the recoveree [k] [27].

Recoveree must be seised of the freehold.

In all recoveries it is necessary that the recoveree, or tenant to the *praecipe*, as he is usually called, be actually seised of the freehold, else the recovery is void [l] [28]. For all actions, to recover the seisin of lands, must be brought against the actual tenant of the freehold, else the suit will lose its effect: since the freehold cannot be recovered of him who has it not. And though these recoveries are in themselves fabulous and fictitious, yet it is necessary that there be *actores fabulae* properly qualified. But the nicety thought by some modern practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the *praecipe*, is removed by the provisions of the statute 14 Geo. II. c. 20, which enacts, with a retrospect and conformity to the antient rule of law [m], that, though the legal freehold be vested in lessees, yet those who are entitled to the next freehold estate in remainder or reversion may make a good tenant to the *praecipe*; —that, though the deed or fine which creates such tenant

[k] Salk. 571. [l] Pigot, 28. [m] Pigot, 41, &c. 4 Burr. 115.

(27) If a tenant in tail, to whom the estate has descended *ex parte maternâ*, suffer a recovery, and declare the uses to himself in fee, the estate will descend to an heir on the part of the mother, even if he had the reversion in fee from his father, and *vice versâ*; but if he took the estate-tail by purchase, the new fee will descend to the heirs general. (5 T. R. 104). If then a person, who has inherited an estate-tail from his mother, wish to cut off the entail, and to make the estate descendible to his heirs on the part of the father, after the recovery he ought to make a common conveyance to trustees, and to have the estate re-conveyed back by them, by which means he will take the estate by purchase, which will then descend to his heirs general.—[CHRISTIAN.] But the law is now different; vide ante, p. 240, n. 43.

(28) See Burr. 60; 3 B. & Cr. 388. But the parties to the recovery and privies are estopped by the record, as in the case of a fine, from taking advantage of this defect; and thus a recovery may be operative without a good tenant to the præcipe. (2 N. R. 491). But the issue in tail of the recoveror, claiming per formam doni, are not bound by this estoppel; and, as there could be no warranty in a recovery, its operation in this respect was not so strong as that of a fine. (Vide ante, p. 354, n.)

be subsequent to the judgment of recovery, yet, if it be in the same term, the recovery shall be valid in law;—and that, though the recovery itself do not appear to be entered, or be
[363] not regularly entered, on record, yet the deed to make a tenant to the *praecipe*, and declare the uses of the recovery, shall, after a possession of twenty years, be sufficient evidence, on behalf of a purchasor for valuable consideration, that such recovery was duly suffered. And this may suffice to give the student a general idea of common recoveries, the last species of assurances by matter of record.

Deeds to *lead* or declare the uses of fines or recoveries.

Before I conclude this head, I must add a word concerning deeds to *lead*, or to *declare*, the *uses* of fines, and of recoveries. For if they be levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, enure only to the use of him who levies or suffers them [n]. And if a consideration appears, yet, as the most usual fine, "*sur cognizance de droit come ceo, &c.*" conveys an absolute estate, without any limitations, to the cognizee; and as common recoveries do the same to the recoveror, these assurances could not be made to answer the purpose of family settlements, (wherein a variety of uses and designations is very often expedient), unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. The fine or recovery itself, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements in the vast and intricate machine of a voluminous family settlement. And if these deeds are made previous to the fine or recovery, they are called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As, if A., tenant in tail, with reversion to himself in fee, would settle his estate on B. for life, remainder to C. in tail, remainder to D. in fee; this is what by law he has no power of doing effectually, while his own estate-tail is in being. He therefore usually, after making the settlement proposed, covenants to levy a fine (or if there be any intermediate remainders, to suffer a recovery) to E., and directs that the same shall enure to the uses in such settlement mentioned. This is now a deed to *lead* the uses of the fine or recovery; and the fine when levied, or recovery when

[n] Dyer, 18.

suffered, shall enure to the uses so specified, and no other. For though E., the cognizee or recoveror, hath a fee simple vested in himself by the fine or recovery; yet, by the operation of this deed, he becomes a mere instrument or conduit-pipe, seised only *to the use* of B., C., and D., in successive order: which use is executed immediately, by force of the statute of uses[k]. Or, if a fine or recovery be had without any previous settlement, and a deed be *afterwards* made between the parties *declaring* the uses to which the same shall be applied, this will be equally good as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For, by statute 4 & 5 Ann. c. 16, indentures to *declare* the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, shall be good and effectual in law, and the fine and recovery shall enure to such uses, and be esteemed to be only in trust, notwithstanding any doubts[29] that had arisen [364]

Stat. 4 & 5 Ann. c. 16.

[k] This doctrine may perhaps be more clearly illustrated by example. In the deed or marriage settlement in the Appendix, No. II. § 2, we may suppose the lands to have been originally settled on Abraham and Cecilia Barker for life, remainder to John Barker in tail, with divers other remainders over, reversion to Cecilia Barker in fee; and now intended to be settled to the several uses therein expressed, *viz.* to Abraham and Cecilia Barker till the marriage of John Barker with Katherine Edwards, and then to John Barker for life; remainder to trustees to preserve the contingent remainders; remainder to his wife Katherine for life, for her jointure; remainder to other trustees, for a term of five hundred years; remainder to the first and other sons of the marriage in tail; remainder to the daughters in tail; remainder to John Barker in tail; remainder to Cecilia Barker in fee. Now it is necessary, in order to bar the estate-tail of John Barker, and the remainders expectant thereon, that a recovery be suffered of the premises; and it is thought proper (for though usual it is by no means necessary, see Forrester, 167), that in order to make a good tenant of the freehold or tenant to the *præcipe*, during the coverture, a fine should be levied by Abraham, Cecilia, and John Barker; and that the recovery itself be suffered against this tenant to the *præcipe*, who shall vouch John Barker, and thereby bar his estate-tail, and become tenant of the fee-simple by virtue of such recovery; the uses of which estate so acquired are to be those expressed in this deed. Accordingly, the parties covenant to do these several acts (see page viii.); and in consequence thereof the fine and recovery are had and suffered (No. IV. and No. V.) of which this conveyance is a deed to *lead* the uses.

(29) These doubts might have been safely left to the judges. The Statute of Frauds merely required that declarations of trusts or confidences should be *manifested and proved* by writing signed by the party enabled to declare such trust, and was satisfied by a *subsequent declaration*. (3 Ves. 707). But it is very doubtful whether this section of the statute extends to *uses*.

on the statute of frauds, 29 Car. II. c. 3, to the contrary [30].

(1 P. Wms. 112). However this may be, it is clear, that resulting uses may be rebutted by parol; (Gilb. Eq. Rep. 16; Dougl. 25); and until the use of a fine or recovery is otherwise limited, it results to the conusor or recoveree. All that is required is, evidence of what was the agreement at the time of making the assurance. If the uses were declared by deed precedent, that was binding, and could not be contradicted except by another deed, also prior to the fine or recovery; but a deed subsequent to the fine or recovery was mere evidence of the agreement, and might be rebutted even by parol evidence of a contrary agreement at the time. (Holt, 733). The statute of Anne has at all events set up the uses by relation from the date of the fine or recovery, so as to give effect to an intermediate devise of the lands, and to exclude the conusor or recoveror's wife from her dower; although even this has strangely been doubted. (See Park on Dower, 198).

(30) The student will now be prepared to understand the provisions of the "Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," of which only a very brief summary can be attempted here: "In order to obtain a clear and correct understanding of that important portion of the act which relates to entailed estates, we should note, first, that, after the statute de donis, tenants in tail were incompetent to alien effectually as against the issue, remainderman, and reversioner, until enabled by the common-law stratagem of a recovery, or, as against the issue only, until enabled by the statutory force of a fine, with proclamations; secondly, that the act in question abolishes both these devices, without repealing the statute de donis; thirdly, that it expressly *enables* tenants in tail to alien in fee; fourthly, that in the case of a tenancy in tail in remainder, expectant on a particular estate or estates of a given description, it institutes a functionary, styled protector of the settlement; fifthly, that it *restrains* the tenant in tail, there being a protector of the settlement, from aliening as against posterior takers, without the consent of the protector; and sixthly, that it prescribes the observance of certain formalities, as well in regard to the alienation of the tenant in tail, as in regard to the consent of the protector. It is hardly necessary to state, that the contracts as well as the ordinary conveyances of a tenant in tail, retain whatever efficacy was attributed to them by the old law; or that the operation of a fine or a recovery, as a tortious or wrongful alienation, or of a fine with proclamations, as a bar by nonclaim, under the old statutes, will not belong to the substituted assurance." (1 Hayes's Introduction to Conveyancing, p. 193; in which valuable work an elaborate and instructive commentary on this important statute, and a statement of the resemblances and differences between the new and old modes of assurance, will be found).

The act (which, by the way, may be recommended to the student's attention as a model of legislative draughtsmanship) commences in the modern fashion, with a definition of some terms employed in it. The word *estate* is to include any interest, charge, lien, or incumbrance, either at law or in equity, in, upon, or affecting lands, or money subject to be invested in the purchase of lands. A *base fee* is declared to mean exclusively the estate in fee-simple, into which an estate-tail is converted, when the issue in tail are barred; but subsequent remaindermen, &c., are not. *Estate tail*, in addition to its usual meaning, is to include a

base fee. *Actual tenant in tail,* one whose estate has not been barred, although it may have been divested or turned to a right. *Tenant in tail,* is either an actual tenant in tail, or one who would have been such if the estate had not been converted into a base fee.

The act abolishes fines and recoveries from the end of the year 1833, and makes a special provision for the fulfilment of covenants and agreements to make such assurances previously entered into (ss. 2 & 3). It then provides a remedy for defects and errors of various descriptions in fines and recoveries already levied and suffered, (ss. 4 to 13); and after providing for the custody of the records, and declaring warranties by tenants in tail to be void against the issue in tail and ulterior takers, proceeds to the substituted mode of assurance.

By sect. 14, "every *actual tenant in tail,* whether in *possession, remainder, contingency, or otherwise,* shall have full power to dispose of, for an estate in fee-simple in possession, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate-tail which shall be vested in or might be claimed by, or which, but for some previous act, would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same; and also as against all persons (including the king's most excellent majesty, his heirs and successors,) whose estates are *to take effect after the determination, or in defeazance* of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made."

By sect. 19, after the 31st Dec. 1833, "in every case, in which an estate tail in any lands shall have been barred and converted into a base fee (either before or on or after that day), the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons (including the king's most excellent majesty, his heirs and successors,) whose estates are to take effect after the determination or in defeazance of the base fee into which the estate tail shall have been converted, so as to *enlarge the base fee* into a fee-simple absolute; saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made."

These enabling clauses appear to go beyond what could have been done under the old law; for formerly, if A., tenant in tail, with remainders over, had levied a fine to the use of B. in tail, with remainders over, thereby creating estates defeasible by the failure of issue under the original entail, a recovery, suffered by B., would have barred the estates created by A.'s fine, but would not have barred the remainders expectant on the failure of issue of A.; and generally a recovery, suffered by a tenant in tail, did not necessarily confer any greater or less defeasible estate than that which the donor of the entail had. His recovery barred executory limitations annexed to his own estate, but not those annexed to the estate of his donor. (1 Prest. Conv. 2). But under this act, the tenant in tail's disposition is effectual against all persons whose estates are to take effect either after the determination, or *in defeazance of* the estate tail.

Sect. 38 gives to the disposition of a tenant in tail under the act the effect of confirming any prior voidable estate created by him in favour of a purchaser for valuable consideration; but not adversely to the object of the new dispo-

sition, if he is a purchaser for valuable consideration, without notice of the prior estate.

Sect. 39 enacts, that if a base fee and the remainder or reversion in fee in the same lands shall, at any time before or after the passing of the act, be united in the same person, and at any time after the passing of the act there shall be no intermediate state between them, the base fee shall not merge, but be ipso facto *enlarged* into as large an estate as the tenant in tail (with the consent of the protector, if any,) might have created under the act, if such remainder or reversion had been vested in any other person. The difference between enlargement and merger is, that when the base fee is enlarged, the enlarged estate is subject to any prior charges on the base fee, and not to any on the reversion; but if the base fee had merged, the charges on it would have failed, and those on the reversion would have come into force.

By sect. 21, a disposition under the act by way of mortgage, or for any other limited purpose, shall, to the extent of the estate created, be an absolute bar in equity as well as at law against all persons against whom such disposition may be made under the act, notwithstanding a contrary intention expressed in the deed. Provided that if the estate created be only pour autre vie, or for years absolute or determinable, or only an interest, charge, lien or incumbrance, without any term or greater estate by way of security, then such disposition shall be a bar only so far as may be necessary to give full effect to such charge, &c., notwithstanding any expression of a contrary intention.

We now come to the restraining and qualifying clauses. No disposition under the act by a woman tenant in tail, ex provisione viri, within the 11 Hen. 7, c. 20, under a settlement made before August 28, 1833, is to be made without the same assent as is required by that statute to her fine and recovery, (but, except as to such settlements, that statute is repealed); (ss. 16, 17); and the power given by the act is not to extend to expectant heirs in tail, or to tenants in tail after possibility of issue extinct, or to tenants in tail who, by the 34 & 35 Hen. 8, c. 20, "An Act to embar feigned Recovery of Lands wherein the King is Reversioner," or by any other act, are restrained from barring their estates tail. (Sects. 18, 20).

A tenant in tail could not have suffered a recovery if the legal freehold was outstanding in a third person as tenant for life or for a greater estate, without the concurrence of such person in becoming or in creating the tenant to the præcipe or writ of entry; and this circumstance operated as a material protection of family settlements, under which the father was usually tenant for life, with remainder to his son in tail; and the concurrence of the two parties in a recovery was generally founded on an agreement to resettle the estates, so as to give the son an estate for life (subject either to a previous life-estate or a rent-charge in favour of his father), with remainder to his first and other sons in tail; and thus estates remained in families for many centuries. This effect, which was formerly an accidental consequence from the form of real actions, is now secured in a modified shape by provisions of which it is the express object.

By the 22nd and following sections, if at the time when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands or any of them, *under the same settlement*, any estate for years determinable on the dropping of a life or lives, or any greater estate, not being an estate for years, (including, therefore, an estate tail, and including estates merely restored or confirmed by the settlement), prior to the estate tail, the person who shall be owner

of such prior estate, or the first of such prior estates, if more than one, then subsisting under the settlement, or *who would have been such owner if no absolute disposition thereof had been made*, shall be protector of the settlement of the lands included in such prior estate, notwithstanding any charges upon or alienation of such prior estate. If there be several owners of such estate under the settlement, each owner is to be protector in respect of the undivided share over which the settlement gave him power. If a married woman be protector, she and her husband shall be protector, unless the estate was settled to her separate use.

Sect. 26 excludes lessees at a rent from the protectorship; and sect. 27 enacts that no woman, in respect of her dower, and (except in the case hereinafter provided for of a bare trustee under a settlement made on or before the 31st December, 1833) no bare trustee, heir, executor, administrator or assign, in respect of any estate taken by him as such bare trustee, &c., shall be the protector of a settlement. This clause appears to exclude the heir of a tenant in tail from the protectorship of a subsequent estate tail in remainder, (although such heir is capable of barring such remainder); and, consequently, by the operation of the 33rd section, to be noticed presently, to confer the office of protector on the Court of Chancery. (But see 1 Hayes's Conv. 173, contrà).

By sect. 28, where under any settlement there shall be more than one estate prior to an estate tail, and one of them shall, by either of the last preceding clauses, be excluded from conferring the protectorship, then the person (if any) who, if such estate did not exist, would be protector, shall be protector. It is not easy to see how this clause would operate in the case of a limitation to A. for the life of B., in trust for B., remainder to C. in tail. The word *estate*, by the interpretation clause, includes equitable estates, so that here we have two estates prior to the entail; and A., being a bare trustee, cannot be protector; but can it be said that B.'s estate would exist if A.'s estate were out of the way? It would, if A. were, in breach of trust, to put an end to his estate; (2 P. Wms. 181); but non constat that it would, if A.'s estate had never been created. The best opinion, however, is, that B. would be protector. (See 2 Sugd. Vend. & Purch. 295; 1 Hayes's Conv. 174).

Sect. 32 authorizes any settlor entailing lands by the settlement to appoint not more than three persons in esse, not being aliens, to be protectors of the settlement in lieu of the person who would otherwise have been protector, either for all or any part of the time during which such person might have continued protector, and, by means of a power to be inserted in such settlement, to perpetuate, during the whole or any part of such period, the protectorship in any person or persons in esse whom the donee of the power shall appoint in the place of any protector or protectors dying or by deed relinquishing the protectorship: provided that there be no more than three protectors at one time, and that every deed of appointment of a protector under a power in a settlement, or of relinquishment of protectorship, be void unless inrolled in Chancery within six months after execution. If there be no protector especially appointed, the person qualified by estate is to be protector.

In case of the lunacy of a protector, the Lord Chancellor, or other person or persons having like jurisdiction in lunacy, shall be protector; and in case it is not known whether the protector be living or dead, or in case the protector is an infant, or convict of treason or felony, or the settlor shall in the settlement have declared, that the person who would be qualified by estate shall not be protector, or shall not have

appointed a substitute, or from any other cause there shall be no protector, and yet a sufficiently qualifying estate be in existence, the Court of Chancery shall be protector.

Having instituted the office of protector, the act proceeds to define its functions. By sect. 34, the consent of the protector, if there be any, is requisite to enable an actual tenant in tail to dispose of the lands to the full extent authorized by the former part of the act. Without such consent, a disposition under the act by the tenant in tail shall be good only against all persons who by force of any estate tail, which shall be vested in or might be claimed by, or which, but for some previous act or defect, would have been vested in or might have been claimed by the person making the disposition, at the time of his making the same, shall claim the lands entailed. And, by sect. 35, when an estate tail shall have been converted into a base fee, the consent of the protector, if any, shall be requisite to enable the person who would have been tenant of the estate tail if the same had not been barred, to exercise the power of disposition under the act. The 36th and 37th sections exclude the protector from control or responsibility, in equity or otherwise, in the exercise of his privilege.

The 40th section points out the form of assurance to be adopted, enacting, "that every disposition of lands under this act by a tenant in tail thereof shall be affected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were even an estate in fee-simple absolute." But such assurance must be by deed; and, in the case of a married woman, be made with her husband's concurrence, and be acknowledged in the manner required in another part of the act. No dispositions resting in contract merely are to have any operation under the act.

By sect. 41, the disentailing assurance (unless it be a lease for twenty-one years, or less, in possession, or to take effect within a year, and at a rent of not less than five-sixths of a rack-rent), is required to be inrolled in Chancery within six calendar months; and a bargain and sale inrolled within six calendar months is declared to be effectual under the act, notwithstanding the Statute of Inrolments.

The consent of the protector is to be given on or before the making of the assurance, and either by the disentailing deed itself, or by a distinct deed of consent, which must be inrolled: such consent is to be irrevocable, and if made by a distinct deed, is to be considered as absolute and unqualified, unless by the deed it is confined to a particular assurance.

Entails of copyholds are to be barred in the same manner as those of freeholds, except that, if the estate is legal, the assurance must be by surrender; and, if it is equitable, may be either by surrender or by a deed, to be entered on the court-rolls. The consent of the protector may be given either in person to the lord or his representative taking the surrender, who is to make a memorandum to that effect, to be signed by the protector, and entered on the rolls, or by deed of even or anterior date, to be entered on the rolls. If the tenant in tail make two conflicting dispositions by deed, that which is first entered on the rolls (being a conveyance for a valuable consideration) shall have priority.

After providing for the disposal of estates-tail belonging to bankrupts, the act proceeds to the subject of entailed money. When money is subject to a trust to be invested in land, equity, in pursuance of its maxim of considering that as done which ought to be done, regards the money as being already converted into land; and, where the land to be purchased was directed to be entailed, treated the money as if

it were already entailed lands; but with this inconvenient result, that, as the lands were merely imaginary, no recovery could be suffered for barring the entail. Where, indeed, under the settlement, a person was entitled as tenant in tail in possession, with the immediate remainder or reversion in fee in himself, he was entitled to receive the money; but in every other case the only means of reaching the money was to get up, with the aid of a friend, a fictitious purchase and settlement of some estate, followed by a recovery to the use of the feigned vendor. The statutes 39 & 40 Geo. 3, c. 56, and 7 Geo. 4, c. 45, substituted for this process the often equally expensive course of a petition to the Court of Chancery. These acts are repealed; and now lands, subject to a trust for sale and reinvestment of the proceeds in the purchase of other lands to be entailed, and money directed to be laid out in purchasing lands to be entailed, are to be treated as being the actual lands to be entailed, and the entail is to be barred in the same manner; freeholds, leaseholds, and money, subject to such trusts, being regarded as freeholds; and copyholds, as if they were the very copyholds purchased and settled. But leaseholds for years, and money, are to be treated, as to the person in whose favour the disposition is made, as personal estate; and the deed of disposition thereof, being an assignment, inrolled in Chancery within six calendar months.

Having thus furnished a substitute for recoveries, the act next provides for the passing of estates and interests of married women, the principal function in modern times of fines.

Sect. 77 enacts, that it shall be lawful for every married woman, in every case except that of being tenant in tail, for which the act has already provided, by deed, to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate, which she alone, or she and her husband in her right, may have in any such lands or money, and also to release or extinguish any power over such lands or money, as effectually as if she were a feme sole, provided that the husband (except in certain cases) concur in the deed; provided also, that the act shall not extend to copyholds, of which a married woman or her husband in her right may be seised for an estate at law, in any case where the same object could have been effected, with the husband's concurrence, by a customary surrender. But a surrender of a married woman's equitable interest in copyholds, taken with the proper examination, as if the estate had been legal, shall be effectual to pass her interest.

Every deed or disposition made by a married woman under the act (except a deed of consent as protector) must be produced and acknowledged by her before a judge or a Master in Chancery, or two special commissioners, to be appointed in manner directed by the act. The mode of taking such acknowledgments, and the custody of the certificates of acknowledgment, which the act directs to be filed, &c., are placed under the direction of the Chief Justice of the Common Pleas.

In the following session the provisions of this act were extended to Ireland by the stat. 4 & 5 Will. 4, c. 92, which, with some few variations, is a transcript of its predecessor.

CHAPTER XXII.

OF ALIENATION BY SPECIAL CUSTOM.

Alienation of copyhold and customary estates.

WE are next to consider assurances by special custom, obtaining only in particular places, and relative only to a particular species of real property. This, therefore, is a very narrow title; being confined to copyhold lands, and such customary estates as are holden in antient demesne, or in manors of a similar nature; which, being of a very peculiar kind, and originally no more than tenancies in pure or privileged villenage, were never alienable by deed [1]; for, as that might tend to defeat the lord of his signiory, it is therefore a forfeiture of a copyhold [a]. Nor are they transferable by matter of record, even in the king's courts [2]; but only in the court baron of the lord. The method of doing this is generally by *surrender;* though in some manors, by special custom, recoveries may be suffered of copyholds [b3]; but these differing in nothing material from recoveries of free land, save only that they are not suffered in the king's courts, but in the court baron of the manor, I shall confine myself to conveyances by surrender, and their consequences.

Surrender, *sursumredditio,* is the yielding up of the estate by the tenant into the hands of the lord, for such purposes as in the surrender are expressed. As, it may be, to the use and behoof of A. and his heirs; to the use of his own

[a] Litt. § 74. [b] Moor. 637.

(1) What is here said must be understood of the legal title to copyholds; a merely equitable interest in a copyhold will pass by any writing signed by the person entitled.

(2) This is true, because *real* actions, which alone were conclusive as to the title, could only be brought to recover copyholds in the lord's court. But ejectment is commonly brought in the superior courts to recover the possession of copyholds. (See 1 Jac. & W. 549).

(3) Vide ante, p. 364, (n.).

will; and the like. The process, in most manors, is that the tenant comes to the steward[4], either in court, (or, if the custom permits, out of court[5]), or else to two customary tenants of the same manor, provided there be also a custom to warrant it; and there, by delivering up a rod, a glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his said steward, or of the said two tenants, all his interest and title to the estate[6]; in trust to be again granted out by the lord, to such persons and for such uses as are named in the surrender, and the custom of the manor will warrant. If the surrender be made out of court, then, at the next or some subsequent court, the jury or homage must present and find it upon their oaths; which presentment is an information to the lord or his steward of what has been transacted out of court. Immediately upon such surrender, in court, or upon presentment of a surrender made out of court, the lord by his steward grants the same land again to *cestuy que use*, (who is sometimes, though rather improperly, called the surrenderee), to hold by the antient rents and customary services; and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender which must be exactly pursued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name, and as the symbol, of corporal seisin of the lands and tenements. Upon which admission he pays a fine to the lord

Surrender.

Re-grant.

Admittance.

(4) The lord of a manor, or the steward or deputy steward, may now hold a customary court, in the absence of any customary tenants, and though there be at the time no customary tenants holding by copy. But proclamations at any court so holden are declared inoperative against persons absent, unless notified to them within a month. (4 & 5 Vict. c. 35, s.86).

(5) The surrender may be taken either by the lord or his steward, not only out of court, but out of the manor, for it may be convenient, and can be prejudicial to no one. (1 Salk. 184). "A custom, that the steward shall *not* take surrenders out of the manor, is void." (Per Curiam, 1 Ld. Raym. 76). But previously to the statute 4 & 5 Vict. c. 35, he could not *admit* out of the manor. (Ib). Nor even out of court. (3 Nev. & M. 225).

(6) By a surrender of a tenant in fee or copyholder, no more of his estate passes than will satisfy the uses declared. The residue will continue in him as of his old estate. (9 Co. 107 a; 1 Brownl. 181; Cro. Eliz. 442; 4 Co. 29 b; Gilb. Ten. by Watkins, 254, and n. 116).—[CHITTY.]

according to the custom of the manor, and takes the oath of fealty[7].

Surrenders are of feudal origin.

In this brief abstract of the manner of transferring copyhold estates, we may plainly trace the visible footsteps of the feodal institutions. The fief, being of a base nature and tenure, is unalienable without the knowledge and consent of the lord. For this purpose it is resigned up, or surrendered into his hands. Custom, and the indulgence of the law, which favours liberty, has now given the tenant a right to name his successor; but formerly it was far otherwise. And I am apt to suspect that this right is of much the same antiquity with the introduction of uses with respect to freehold lands; for the alienee of a copyhold had merely *jus* [367] *fiduciarium*, for which there was no remedy at law, but only by *subpœna* in Chancery[c]. When, therefore, the lord had accepted a surrender of his tenant's interest, upon confidence to re-grant the estate to another person, either then expressly named or to be afterwards named in the tenant's will, the Chancery enforced this trust as a matter of conscience; which jurisdiction, though seemingly new in the time of Edward IV.[d], was generally acquiesced in, as it opened the way for the alienation of copyholds, as well as of freehold estates, and as it rendered the *use* of them both equally devisable by testament. Yet, even to this day, the new tenant cannot be admitted but by composition with the lord, and paying him a fine by way of acknowledgment for the licence of alienation. Add to this the plain feodal investiture, by delivering the symbol of seisin in presence of the other tenants in open court; "*quando hasta vel aliud corporeum quidlibet porrigitur a domino se investituram facere dicente; quae saltem coram duobus vasallis solemniter fieri*

[c] Cro. Jac. 568. [d] Bro. Abr., tit. *Tenant per copie*, 10.

(7) Femes covert and infants may be admitted by their attorney or guardian; and in default of their appearance, the lord may appoint a guardian or attorney for that purpose. If the fines are not paid, the lord may enter and receive the profits till he is satisfied, accounting yearly for the same upon demand of the person or persons entitled to the surplus, but no forfeiture shall be incurred by infants or femes-covert for not appearing, or refusing to pay fines. (9 Geo. 1, c. 29). See further, as to the admittance of married women, infants, and lunatics, 11 Geo. 4 & 1 Will. 4, c. 65.

debet[c]:" and, to crown the whole, the oath of fealty is annexed, the very bond of feodal subjection. From all which we may fairly conclude, that, had there been no other evidence of the fact in the rest of our tenures and estates, the very existence of copyholds, and the manner in which they are transferred, would incontestably prove the very universal reception which this northern system of property for a long time obtained in this island; and which communicated itself, or at least its similitude, even to our very villeins and bondmen.

Copyholds cannot be conveyed by feoffment or grant.

This method of conveyance is so essential to the nature of a copyhold estate, that it cannot properly be transferred by any other assurance [8]. No feoffment or grant has any operation thereupon. If I would exchange a copyhold estate with another, I cannot do it by an ordinary deed of exchange at the common law, but we must surrender to each other's use, and the lord will admit us accordingly [9]. If I would devise a copyhold, I must surrender it to the use of my last will and testament [10]; and in my will I must de-

[c] Feud. l. 2, t. 2.

(8) As to alienations in certain manors by customary bargains and sales, see 2 B. & Ad. 585; 1 Russ. & M. 33. By the customs of some manors, tenants were restrained from dividing and alienating their antient tenements in portions; but these customs have been abolished by the stat. 4 & 5 Vict. c. 35, s. 92.

(9) Trusts or equitable estates in copyholds may be creafed in the same manner as in freehold lands; but copyholds are not within the Statute of Uses. A use declared upon a surrender of copyholds is not therefore the same as a use limited upon a common law conveyance, but is a mere direction to the lord to admit the particular person indicated, which the custom obliges him to obey.

(10) See 2 Cr., M. & R. 503. To prevent the recurrence of the evils which frequently resulted from the devisors of copyhold lands omitting, either from negligence or ignorance, to surrender them to the uses of their wills, it was enacted by 55 Geo. 3, c. 192, that devises of copyholds which were devisable by surrender and will should be as effectual without a surrender; the proper stamp duties, fees, &c., which would have been payable upon such surrender being paid on the admission of the devisee. But this statute was repealed by the recent Statute of Wills, (7 Will. 4 & 1 Vict. c. 26), which authorizes a testator to dispose of his customary and copyhold estates, notwithstanding he has not surrendered, or, whether claiming as heir, devisee, or surrenderee, has not been admitted; and notwithstanding the want of a custom to devise by surrender to the use of a will or otherwise. The act makes provision for the satisfaction of the proper fines, fees, and stamp duties. But where a surrender by a married woman to the use of her will

clare my intentions, and name a devisee, who will then be entitled to admission[f] [11]. A fine or recovery had of copyhold lands in the king's court may indeed, if not duly reversed, alter the tenure of the lands, and convert them into frank fee[g], which is defined in the old book of tenures[h] to be "land pleadable at the common law:" but, upon an action on the case, in the nature of a writ of *deceit*, brought by the lord in the king's court, such fine or recovery will be reversed, the lord will recover his jurisdiction, and the lands will be restored to their former state of copyhold[i] [12].

In order the more clearly to apprehend the nature of this peculiar assurance, let us take a separate view of its several parts; the surrender, the presentment, and the admittance.

1. Nature of a surrender.

I. A surrender [13], by an admittance, subsequent whereto the conveyance is to receive its perfection and confirmation,

[f] Co. Copyh. § 36.
[g] Old Nat. Brev. t. *briefe de recto clauso*, F. N. B. 13.
[h] Tit. *tenir en franke fee*.
[i] See Vol. III. page 166*.

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was required by the particular custom of the manor, the want of a surrender was not aided; for the 55 Geo. 3, c. 192, only aids the want of a formal surrender, and the surrender in this case is matter of substance, and must be accompanied by the separate examination of the wife. (5 Barn. & Ald. 492). And the recent Statute of Wills gives no new powers of devising to a married woman. (Sect. 8).

(11) Unless a surrender was made by the testator some time before his death to the use of his last will and testament, the devise of a copyhold was in general absolutely void, and the estate descended to the heir at law: but in three instances a court of equity would have interfered and supplied the defect of a surrender, viz. when copyholds were devised for the payment of debts, and in favour of a wife or younger children. Yet a wife or younger children would not have been relieved in equity, if the heir was disinherited or unprovided for. (1 Atk. 387; 3 Bro. 229; 1 Cox's P. Wms. 60). But a wife could have been relieved against an heir, who was not the child of the testator, or one who had an equal claim to his protection and bounty as his wife, though such heir was unprovided for; for the wife will be preferred, where there is not an equal moral obligation violated by giving her relief. (3 Bro. 229). If both freehold and copyhold estates were devised for the payment of debts, the Chancellor would not have supplied the defect of the surrender of the copyhold, unless the freehold was insufficient. (1 Bro. 273; 2 Bro. 325).

Equity would not assist a brother, grand-children, or a natural child. (3 Atk. 189; 2 Ves. 582). Lord Somers' decree in favour of a grandson was reversed by the House of Lords. (6 Ves. jun. 544).—[CHRISTIAN.]

(12) See stat. 3 & 4 Will. 4, c. 74, s. 5.

(13) A surrender does not destroy a contingent remainder. (2 Saund. 386;

is rather a manifestation of the alienor's intention, than a transfer of any interest in possession. For, till admittance of *cestuy que use*, the lord taketh notice of the surrenderor as his tenant: and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord. Yet the interest remains in him not absolutely, but *sub modo;* for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender. But no manner of legal interest is vested in the nominee before admittance. If he enters, he is a trespasser, and punishable in an action of trespass [14]: and if he surrenders to the use of another, such surrender is merely void, and by no matter *ex post facto* can be confirmed [15]. For, though he be admitted in pursuance of the original surrender, and thereby acquires afterwards a sufficient and plenary interest as absolute owner, yet his second surrender previous to his own admittance is absolutely void *ab initio:* because at the time of such surrender he had but a possibility of an interest, and could therefore transfer nothing: and no subsequent admittance can make an act good, which was *ab initio* void. [369] Yet, though upon the original surrender the nominee hath

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see 11 East, 185). It receives the same construction as a deed operating by the Statute of Uses, and therefore cross remainders cannot be implied. (1 Saund. 186 b). A surrender may be by him in remainder. (1 Saund. 147 a, n. 3). The surrenderee is an assignee within the equity of the statute Hen. VIII. (1 Saund. 241 a). His title begins from the date of the surrender, by relation; and therefore, after he has been admitted, he may lay his demise in ejectment on the day of surrender, and recover mesne profits therefrom. (1 T. R. 600; 2 Saund. 422 c, n. 2). A feme-covert, who surrenders a copyhold (which she can only do with her husband's consent), ought previously to be examined separately from her husband by the steward of the manor, or before two customary tenants by special custom; and if it be to such uses as she shall by will appoint, her will, though made by her, living her husband, is a good execution. (4 Taunt. 294; see 11 Moore, 243; 3 Ad. & El. 265).—[CHITTY.]

(14) The surrenderee would not now be considered a trespasser; for it has been determined that he may recover in an ejectment against the surrenderor, upon a demise laid after the surrender, where there was an admittance of such party before trial: but as the surrenderor after the surrender is considered merely a trustee for the nominee, it should seem that the decision would have been the same even if the subsequent admittance had not been proved. (1 T. R. 600; 5 Burr. 2764; 16 East, 208).—[CHRISTIAN.]

(15) See 11 East, 246.

but a possibility, it is however such a possibility as may, whenever he pleases, be reduced to a certainty: for he cannot either by force or fraud be deprived or deluded of the effect and fruits of the surrender; but, if the lord refuse to admit him, he is compellable to do it by a bill in Chancery, or a *mandamus* [k] [16]: and the surrenderor can in nowise defeat his grant; his hands being for ever bound from disposing of the land in any other way, and his mouth for ever stopped from revoking or countermanding his own deliberate act [l].

2. Of the presentment.

2. As to the *presentment;* that, by the *general* custom of manors, is to be made at the next court baron immediately after the surrender; but by *special* custom in some places it will be good, though made at the second or other subsequent court [17]. And it is to be brought into court by the *same* persons that took the surrender, and then to be presented by the homage; and in all points material must correspond with the true tenor of the surrender itself. And therefore, if the surrender be conditional, and the presentment be absolute, both the surrender, presentment, and admittance thereupon, are wholly void [m]: the surrender, as being never truly presented; the presentment, as being false; and the admittance, as being founded on such untrue presentment. If a man surrenders out of court, and dies before presentment, and presentment be made after his death, according to the custom, this is sufficient [n]. So too, if *cestuy que use* dies before presentment, yet, upon present-

[k] 2 Roll. Rep. 107.
[l] Co. Copyh. § 39.
[m] Co. Copyh. § 40.
[n] Co. Litt. 62.

(16) See 3 Ves. 756; 1 Jac. & W. 544; 3 B. & Cr. 173.

(17) By the statute 4 & 5 Vict. c. 35, s. 87, every surrender and deed of surrender, which the lord shall be compellable to accept or shall accept, and every will and codicil of which shall be delivered to the lord, his steward, or deputy steward, out of court, or at a court in the absence of the homage, and also every grant and admission under the act, shall forthwith be entered on the court rolls by such lord, steward, or deputy; and such entry shall be of equal effect with an entry made in pursuance of a presentment. And presentment of the surrender, will, or other matter on which an admission is founded, shall not be essential to the validity of the admission, except in cases of grants of common or waste, authorized by the custom to be made with the consent of the homage.

ment made after his death, his heir according to the custom shall be admitted. The same law is, if those into whose hands the surrender is made, die before presentment; for, upon sufficient proof in court that such a surrender was made, the lord shall be compelled to admit accordingly. And if the steward, the tenants, or others into whose hands such surrender is made, refuse or neglect to bring it in to be presented, upon a petition preferred to the lord in his court baron, the party grieved shall find remedy. But if the lord will not do him right and justice, he may sue both the lord, [370] and them that took the surrender in Chancery, and shall there find relief[o].

3. Admittance is the last stage, or perfection, of copyhold assurances. And this is of three sorts: first, an admittance upon a voluntary grant from the lord[18]; secondly, an admittance upon surrender by the former tenant; and, thirdly, an admittance upon a descent from the ancestor[19]. 3. Of the admittance.

In admittances, even upon a *voluntary grant* from the lord, when copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For though it is in his power to keep the lands in his own hands, or to dispose of them at his pleasure, by granting an absolute fee-simple, a freehold, or a chattel interest therein; and quite to change their nature from copyhold to socage tenure, so that he may be well reputed their absolute owner

[o] Co. Copyh. § 40.

(18) The admittance of the particular tenant is the admittance of the remainder-man, but the latter may be admitted by himself. (1 Saund. 147 a, n. (3) (4); 12 Ves. 422. The admittance, when made, relates to the time of surrender. (1 Tr. 600; 2 Saund. 422 c, n. 2). A surrenderee cannot forfeit for felony before admittance, for till then the estate is in the surrenderor. (2 Saund. 422 c, n. 2). The lord's grantee has title without any further admittance. (2 B. & Al. 453; 2 Saund. 422 c). If the surrenderee dies before admittance, his heir is entitled to be admitted, and the widow to her free-bench. (2 Saund. 422 d). One effect of admittance is, that a copyholder is thereby estopped, in an action by the lord for a forfeiture, from shewing that the legal estate was not in the lord at the time of admittance. (5 B. & Al. 626; 1 Dowl. & R. 243).—[CHITTY.]

(19) By the statute 4 & 5 Vict. c. 35, ss. 87, 88, the lord, or his steward or deputy steward, may, out of court, and even out of the manor, make any grants authorized by the custom, and admit tenants. (See 3 Nev. & M. 225).

and lord; yet if he will still continue to dispose of them as copyhold, he is bound to observe the antient custom precisely in every point, and can neither in tenure nor estate introduce any kind of alteration; for that were to create a new copyhold: wherefore in this respect the law accounts him custom's instrument. For if a copyhold for life falls into the lord's hands by the tenant's death, though the lord may destroy the tenure and enfranchise the land [20], yet if he grants it out again by copy, he can neither add to nor diminish the antient rent, nor make any the minutest variation in other respects [p]: nor is the tenant's estate, so granted, subject to any charges or incumbrances by the lord [q 21].

Admittance upon a surrender.

In admittances upon *surrender* of another, the lord is to no intent reputed as owner, but wholly as an instrument; and the tenant admitted shall likewise be subject to no charges or incumbrances of the lord; for his claim to the estate is solely under him that made the surrender [r 22].

Admittance upon a descent.

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And, as in admittances upon surrenders, so in admittances *upon descents* by the death of the ancestor, the lord is used as a mere instrument; and, as no manner of interest passes into him by the surrender or the death of his tenant, so no interest passes out of him by the act of admittance. And therefore neither in the one case nor the other, is any respect had to the quantity or quality of the lord's estate in

[p] Co. Copyh. § 41. [2 Q. B. R. 792.]

[q] 8 Rep. 63.

[r] 4 Rep. 27. Co. Litt. 59.

(20) Where a copyhold has been granted for lives, upon the death of one or more of the lives, the heir of the grantee cannot claim by custom a renewal of the grant for fresh lives upon the payment of a reasonable fine, *i. e.* a fine of two years' value, as in the case of a copyhold of inheritance. No custom to renew a copyhold for lives is legal, unless the fine has been certain and unvaried, for copyholds grantable for lives only, if the fine is not certain, are like leases of freehold lands for lives, and renewable only upon the best terms the party can make. (*Warton* v. *King*, Anstr. 659).—[CHRISTIAN.]

(21) See 2 Bos. & P. 346; 2 Wils. 125; 2 B. & Al. 187. But he may regrant it for a less estate than that which had escheated. (Co. Litt. 52. b.) Where a tenement had been customarily granted at a single rent, the lord could not, in the absence of a special custom, grant the tenement in heriots at apportioned rents; (2 Q. B. R. 792); but the recent statute, 4 & 5 Vict. c. 35, s. 92, allows this to be done.

(22) And for this purpose the title of the lord is immaterial; it is sufficient that he is lord de facto. (1 Nev. & P. 215).

the manor. For, whether he be tenant in fee or for years, whether he be in possession by right or by wrong, it is not material; since the admittances made by him shall not be impeached on account of his title, because they are judicial, or rather ministerial acts, which every lord in possession is bound to perform [s].

Admittances, however, upon surrender, differ from admittances upon descent in this, that by surrender nothing is vested in *cestuy que use*, before admittance, no more than in voluntary admittances; but upon descent the heir is tenant by copy immediately upon the death of his ancestor: not indeed to all intents and purposes, for he cannot be sworn on the homage nor maintain an action in the lord's court as tenant; but to most intents the law taketh notice of him as of a perfect tenant of the land instantly upon the death of his ancestor, especially where he is concerned with any stranger. He may enter into the land before admittance [23]; may take the profits; may punish any trespass done upon the ground [t]; nay, upon satisfying the lord for his fine due upon the descent, may surrender into the hands of the lord to whatever use he pleases [24]. For which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine, and not so much necessary for the strengthening and completing the heir's title. Hence indeed an observation might arise, that if the benefit which the heir is to receive by the

The heir is tenant before admittance.

[s] 4 Rep. 27. 1 Rep. 140. [t] 4 Rep. 23.

(23) 1 Per. & Dav. 37. And, after some fluctuation of decision, it was settled, that the will of an heir would pass his copyhold, although he died before admittance; but the will of an unadmitted surrenderee or (which was the same case) devisee would not. (3 B. & Ad. 664; 5 Ad. & E. 321; 1 Myl. & K. 456, 649; 2 Id. 449; 2 Nev. & P. 195).

(24) 1 Jac. & W. 611. It has been held, that, the heir having as complete a title without admittance as with it, against all the world but the lord, the court of King's Bench will not grant a mandamus to compel the lord to admit him. (2 T. R. 197). But in a more recent case the court granted a mandamus in favour of an heir. (3 B. & Cr. 172; 4 Dowl. & R. 492). If the lord refuse to admit, the surrenderee cannot have an action on the case against him, but may compel him in Chancery (Cro. Jac. 368), or by mandamus. (2 T. R. 484). And the lord has no right to the fine till after admittance. (Ib.; 1 Watk. on Cop. 1st ed. 263, 287; 1 East, 632; Scriv. on Cop. 405-6). But the surrenderor may bring an action for refusal to admit. (3 Bulst. 217).—[CHITTY.] (See 4 Per. & D. 719).

admittance, is not equal to the charges of the fine, he will never come in and be admitted to his copyhold in court; and so the lord may be defrauded of his fine. But to this
[372] we may reply in the words of Sir Edward Coke [u], "I assure myself, if it were in the election of the heir to be admitted or not to be admitted, he would be best contented without admittance; but the custom in every manor is in this point compulsory. For, either upon pain of forfeiture of their copyhold, or of incurring some great penalty, the heirs of copyholders are inforced, in every manor, to come into court and be admitted according to the custom within a short time after notice given of their ancestor's decease [25].

[u] Copyh. § 41.

(25) Copyholds are not within the statute *de donis*, and cannot be intailed without a special custom within the manor; and where such a custom exists, there may also be a custom to bar the estate-tail, by a recovery suffered in the lord's court; but if no such custom appears of barring by recovery, the intail may be barred by surrender, or otherwise it would amount to a perpetuity. (2 Ves. 601). Yet in some manors the custom of barring by one mode is co-existent with the custom of barring by the other. (2 W. Bl. 944).—[CHRISTIAN.] (Ante, p. 113).

But a person claiming to be admitted as heir need not tender himself for admittance at the lord's court, if he has been refused by the steward out of court. (2 M. & S. 87). A lord of the manor cannot seize a copyhold estate as forfeited *pro defectu tenentis* without a custom; and where he did so, even after three proclamations for the heir to come in, and granted it in fee to another, it was held an absolute seizure, not being warranted by custom, and could not be set up by the lord as a *seizure quousque*.—[CHITTY.] (3 T. R. 162. See 1 B. & Ad. 737).

CHAPTER XXIII.

OF ALIENATION BY DEVISE.

THE last method of conveying real property is by *devise*, or disposition contained in a man's last will and testament. And, in considering this subject, I shall not at present inquire into the nature of wills and testaments, which are more properly the instruments to convey personal estates; but only into the original and antiquity of devising real estates by will, and the construction of the several statutes upon which that power is now founded.

Power to devise restrained on introduction of feudal system.

It seems sufficiently clear, that, before the conquest, lands were devisable by will [a]. But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feodal doctrine of non-alienation without the consent of the lord [b]. And some have questioned whether this restraint (which we may trace even from the antient Germans [c]) was not founded upon truer principles of policy, than the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbours; since it rarely happens, that the same man is heir to many others, though by art and management he may frequently become their devisee. Thus the antient law of the Athenians directed that the estate of the deceased should always descend to his children; or, on failure of lineal descendants, should go to the collateral relations: which had an admirable effect in keeping up equality, and preventing the accumulation of estates. But when Solon [d] made a slight alteration, by permitting them (though only on failure of issue) to dispose of their lands by testament, and devise away estates from the collateral heir,

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[a] Wright of Tenures, 172.
[b] See page 57.
[c] Tacit. de Mor. Germ. c. 21.
[d] Plutarch. in vita Solon.

this soon produced an excess of wealth in some, and of poverty in others: which, by a natural progression, first produced popular tumults and dissensions; and these at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total subversion of their state and nation. On the other hand, it would now seem hard, on account of some abuses (which are the natural consequence of free agency, when coupled with human infirmity), to debar the owner of lands from distributing them after his death as the exigence of his family affairs, or the justice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property: which is the natural consequence of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feodal times: but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

Kent, &c., excepted from the restraint.

However this be, we find that, by the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament[e]; except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted[f]. And though the feodal restraint on alienations by deed vanished very early, yet this on wills continued for some centuries after: from an apprehension of infirmity and imposition on the testator *in extremis*, which made such devises suspicious[g]. Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

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Devise of the use.

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the land, uses began

[e] 2 Inst. 7. Car. 561. 1 Lev. 79. 1 Sid. 77, 135.
[f] Litt. § 167. 1 Inst. 111. [Cro. Robins. on Gavelk. b. 2, c. 5.]
[g] Glanv. l. 7, c. 1.

to be devised very freqnently [h], and the devisee of the use could in chancery compel its execution. For it is observed by Gilbert [i], that, as the popish clergy then generally sate in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer: and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses [j] had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable [1]: which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, viz. 32 Hen. VIII. c. 1, explained by 34 Hen. VIII. c. 5, which enacted, that all persons being seised in fee-simple (except feme-coverts [2], infants, ideots, and persons of nonsane memory) might by will and testament in writing devise to any other *person*, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage: which now, through the alteration of tenures by the statute of Charles the second, amounts to the whole of their landed property, except their copyhold tenements.

Statute of wills, 32 Hen. VIII. c. 1, and 34 Hen. VIII. c. 5, allowed devises of all lands except copyholds.

Corporations were excepted in these statutes, to prevent the extension of gifts in mortmain; but now, by construction of the statute 43 Eliz. c. 4, it is held, that a devise to a corporation for a charitable use is valid, as operating in the

Corporations excepted in statute of wills, but may take devises for charitable uses.

[h] Plowd. 414. [i] On devises, 7. [j] 27 Hen. VIII. c. 10. See Dyer, 143.

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(1) This is not quite correct; by means of a limitation to such uses as the owner should by his will appoint, the land might have been, and frequently is, devised, notwithstanding, or rather by the aid of, the Statute of Uses, and independently of any Statute of Wills, in the same manner as copyholds were made devisable by means of a surrender.

(2) Where lands are conveyed to trustees, a married woman may have the power of appointing the disposition of them after her death, which appointment must be executed like the will of a feme sole, and will be subject to the same rules of construction. (2 Ves. 610; 1 Bro. 99). And though the contrary has been held, yet it has been determined by the House of Lords, that the appointment of a married woman is effectual against the heir at law; though it depends only upon an agreement of her husband before marriage, without any conveyance of the estate to trustees. (6 Bro. P. C. 156). —[CHRISTIAN.]

nature of an *appointment*, rather than of a *bequest*. And indeed the piety of the judges hath formerly carried them great lengths in supporting such charitable uses[k]; it being held that the statute of Elizabeth, which favours appointments to charities, supersedes and repeals all former statutes[l], and supplies all defects of assurances[m]: and therefore not only a devise to a corporation, but a devise by a copyhold tenant, without surrendering to the use of his will[n], and a devise (nay even a settlement) by tenant in tail, without either fine or recovery, if made to a charitable use, are good by way of appointment[o 3].

Signature and attestation required by the Statute of Frauds, 29 Car. 2, c. 3.

With regard to devises in general, experience soon shewed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the hand-writing of another person were allowed to be good wills within the statute[p]. To remedy which, the statute of frauds and perjuries, 29 Car. II. c. 3, directs, that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses[4]. And a

Stat. of Frauds, 29 Car. 2, s. 3.

[k] Ch. Prec. 272.
[l] Gilb. Rep. 45. 1 P. Wms. 248.
[m] Duke's Charit. Uses, 84.
[n] Moor. 890.
[o] 2 Vern. 453. Ch. Prec. 16.
[p] Dyer, 72. Cro. Eliz. 100.

(3) But subject to the provisions of the Mortmain Act, 9 Geo. 2, c. 36. (Ante, p. 273; 3 B. & Al. 149).

(4) Copyholds were not within the statute of Hen. 8, or the Statute of Frauds, and passed by any will that was sufficient to pass personal property. (2 P. Wms. 258; 2 Atk. 37; 2 B. C. C. 58; 7 East, 322). The execution of all wills and codicils, and revoking instruments and testamentary appointments, whatever may be their subject-matter, is now, with some exceptions in favour of mariners and others abroad, placed on the same footing;—that is to say, they are all required to be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature must be made or acknowledged by the testator in the pre-

Revocation of wills.

solemnity nearly similar is requisite for revoking a devise by writing; though the same may be also revoked by burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent[5]; as likewise *impliedly*, by such a great and entire alteration in the circumstances and situation of the devisor, as arises from marriage and the birth of a child[q6].

In the construction of this last statute, it has been adjudged that the testator's name, written with his own hand, at the beginning of his will, as, "I John Mills do make this my last will and testament," is a sufficient signing, without any name at the bottom[r]; though the other is the safer way[7]. It has also been determined, that though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times[s]. But they must all

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[q] Christopher *v.* Christopher, Scacch. 6 Jul. 1771. Spragge *v.* Stone, at the Cock-pit, 27 Mar. 1773, by Wilmot, De Grey and Parker. See page 502.

[r] 3 Lev. 1.

[s] Freem. 486. 2 Ch. Cas. 109. Pr. Ch. 185.

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sence of two or more witnesses present at the same time, who must attest and subscribe the will in the presence of the testator; but no particular form of attestation is necessary. (Stat. 7 Will. 4 & 1 Vict. c. 26, s. 9). The former statutes required the witnesses to be credible, but the recent act expressly declares that the incompetency of a witness to be admitted to prove the execution shall not invalidate the will. (Sect. 14. See 1 Jarm. Wills, 102; infra, p. 379, n.)

(5) See 2 W. Bl. 1043; 3 B. & Ald. 489; 6 Ad. & El. 209; 8 Id. 1.

(6) See 8 Ad. & El. 14. A will can now only be revoked by a separate writing, or an interlineation, obliteration, or alteration of the will itself, executed and attested as a will is required to be executed and attested; or by an actual burning, tearing, or other destroying of the *substance* of the will itself, with intention to revoke; (which intent it is for the Ecclesiastical Court, or in case of a devise of land, &c., for the jury, to gather from the evidence); or lastly, by marriage of the testator, which, under any circumstances, is an absolute revocation of all prior wills.

(7) I conceive that writing the name at the beginning would never be considered a signing according to the statute, unless the whole will was written by the testator himself; for whatever is written by a stranger after the name of the testator affords no evidence of the testator's assent to it, if the subscription of his name in his own hand is not subjoined.—[CHRISTIAN.] See Dougl. 241; 1 Meriv. 503. The will is now required to be signed at the foot or end thereof.

subscribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument [t]. And, in one case determined by the court of king's bench [u], the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses: for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets [8]. This determination, however, alarmed many purchasors and creditors, and threatened to shake most of the titles in the kingdom that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present in the testator's last illness), and if, in such case, the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credit of such *legatees*, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of *creditors*, by directing the testimony of all such creditors to be admitted, but leaving their credit (like that of all other witnesses) to be considered, on a view of all the circumstances, by the court and jury before whom such will shall be contested. And in a much later case [v] the testimony of three witnesses who were creditors, was held to be sufficiently credible, though the land was charged with the

Competency of witnesses.

Stat. 25 Geo. 2. c. 6, avoiding legacies to witnesses.

Creditors competent witnesses.

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[t] 1 P. Wms. 740. [u] Stra. 1253. [v] M. 31 Geo. II. 4 Bur. 1. 430.

(8) And this notwithstanding the witnesses had executed a release of the gift before the trial; an exception to the ordinary rules of evidence, founded on very good and obvious reasons. (4 Burn, Eccl. L. 27; 2 Ves. jun. 636).

payment of debts; and the reasons given on the former determination were said to be insufficient [9].

Devise of lands void, as against specialty creditors.

Another inconvenience was found to attend this new method of conveyance by devise; in that creditors by bond and other specialties, which affected the *heir*, provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. To obviate which, the statute 3 & 4 W. & M. c. 14, hath provided, that all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple, or having power to dispose by will, shall (as against such creditors only) be deemed to be fraudulent and void: and that such creditors may maintain their actions jointly against both the heir and the devisee [10].

In what respect a devise and conveyance differ.

A will of lands, made by the permission and under the control of these statutes, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject; with this difference, that in other conveyances the actual *subscription* of the witnesses is not required by law [w], though it is prudent for them so to do, in order to assist their memory when living, and to supply their evidence when dead: but in devises of lands such subscription is now absolutely necessary, by statute, in order to identify a conveyance which in its nature can never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels; that the latter will operate upon whatever the testator dies possessed of, the former only upon such real

[w] See page, 307, 308.

(9) But a devise to the husband of a witness was held not to be within this statute, and the attestation was therefore bad. (5 B. & Al. 589). This defect is now remedied. (Ante, p. 376, n.; infra, p. 379, n.)

(10) The statute excepts devises for payment of debts, or for the raising of portions for younger children in pursuance of marriage contracts. This act is now repealed, and the payment of simple contract as well as specialty debts out of the real estate of the deceased debtor has been further facilitated by the statutes 11 Geo. 4 & 1 Will. 4, c. 47; 3 & 4 Will. 4, c. 104; and 2 & 3 Vict. c. 60.

estates as were his at the time of executing and publishing his will[x 11]. Wherefore no after-purchased lands will pass

[x] 1 P. Wms. 575. 11 Mod. 148.

(11) (See 8 Ad. & El. 14. Under the recent act, a will may pass after-acquired real estate. The following note of Mr. Christian must, of course, be understood to apply exclusively to wills made before the year 1838). Lord Mansfield has declared, that this does not turn upon the construction of the statute 32 Hen. 8. c. 1, (as some have supposed), which says, that any person *having* lands, &c. may devise: for the same rule prevailed before the statute, where lands were devisable by custom. (Cowp. 90). It has been determined, that where a testator has devised all his lands, or all the lands which he shall have at the time of his death; if he purchase copyholds after the execution of the will, and surrenders them to the uses *declared* by his will, they will pass by the will. (Cowp. 130). Or, if the testator, after making such a devise, purchase freehold lands, and then make a codicil duly executed according to the statute, though no notice is taken of the after-purchased lands; yet if the codicil is annexed to, or confirms the will, or, as it seems, has a reference to it, this amounts to a republication of the will, and the after-purchased lands will pass under the general devise. (Cowp. 158; Com. 383; 4 Bro. 2; 7 Ves. jun. 98). But if the codicil refer expressly to the lands only devised by the will, then the after-purchased lands will not pass under the general devise of the will. (7 T. R. 482).

This also is a general rule, that if a man is seised of an estate in fee, and disposes of it by will, and afterwards make a conveyance of the fee-simple, and take back a new estate, this new estate will not pass by the will, for it is not the estate which the testator had at the time of publishing his will. Some cases have lately produced much discussion, both in the courts of law and equity; they were cases where articles had been entered into before marriage by a man possessed of estates in fee, in order to make certain settlements upon his wife and children, and in which he reserved to himself the reversion in fee, which reversion he afterwards disposed of by his will; and after the making of his will, he executed proper conveyances for the performance of the marriage-articles, in which, after the limitations to his wife and children, he took back the reversion in fee; this was held by Lord Loughborough to be a revocation of the will, and his decision was afterwards confirmed by the House of Lords. (2 Ves. jun. 417).

A similar decision was also made in the Courts of Common Pleas and King's Bench. (7 T. R. 399). In that case Lord Kenyon lays down generally, "that it is now indisputably fixed, that where the whole estate is conveyed to uses, though the ultimate reversion comes back to the grantor by the same instrument, it operates as a revocation of a prior will." (7 T. R. 419).

Equity admits no revocation which would not upon legal grounds be a revocation at law. There are three cases which are exceptions to this general rule, viz. mortgages, which are revocations *pro tanto* only, a conveyance for payment of debts, or a conveyance merely for the purpose of a partition of an estate. In the two first a court of equity decrees the redemption, or the surplus, to that person who would have been entitled if such mortgage or conveyance had not existed, i. e. the devisee. (2 Ves. jun. 428).—[CHRISTIAN.]

If the testator had the equitable interest only in the lands devised, and afterwards acquired the legal estate (as in the case of a contract for pur-

under such devise [y], unless, subsequent to the purchase or contract [z], the devisor republishes his will [a] [12].

[y] Moor. 255. 11 Mod. 127. [z] 1 Ch. Cas. 39; 2 Ch. Cas. 144.
[a] Salk. 238.

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chase, followed by a devise of the estate, and afterwards by a conveyance), the devise was not revoked in equity, unless the estate was limited by the conveyance in a special manner; and the heir, upon whom the legal estate descended, was a trustee for the devisee. On the other hand, if the testator had only the bare legal estate at the time of devising, and afterwards acquired the beneficial interest, the devisee was a trustee for the heir. (9 Ves. 509; 3 Ch. Rep. 188; 1 Jarman on Wills, 44).

(12) If an estate is given to A. and his heirs, or to A. and the heirs of his body, or any interest whatever to A., and A. dies before the testator, the devise is lapsed and void, and the heirs of A. can claim no benefit from the devise. A severe instance of this rule occurred not long ago in Ireland. A father devised his estate to his eldest son and the heirs of his body, and upon failure of his issue to his second son in like manner in tail; the eldest son died before the father, leaving several children; and the father, supposing that the eldest of them would take under the devise, made no alteration in his will: the consequence was, that the devise was lapsed and void, and the second son was entitled by the will to an estate-tail, in exclusion of the children of the eldest brother, the first objects of the father's bounty and regard. The Court of King's Bench in Ireland decided in favour of the grandson; but that decision was reversed by the King's Bench and House of Lords here, the question being too clear to admit a doubt. (6 T. R. 518; 1 Bro. 219; Doug. 330).—[CHRISTIAN.]

Some of the principal alterations effected by the recent Statute of Wills (7 Will. 4 & 1 Vict. c. 26) have been already mentioned in the notes to this chapter. The following summary of the old and new law will enable the student to understand the extent of the alterations introduced:—

As to Wills made before the 1st of January, 1838, and not re-executed or republished on or after that day.	*As to Wills made, re-executed, or re-published on or after the 1st of January, 1838.*
I. WHAT MAY BE GIVEN BY WILL.	
1. Personal chattels of every kind, and leaseholds for years.	
2. Freeholds, customary freeholds, and copyholds—	
except the legal estate in some customary freeholds.	of every kind.
As to customary estates and copyholds, without surrender to the use of the will,	
or admittance of the devisor, where the estate came by descent, or was equitable.	or admittance of the devisor.
3. Not rights of entry.	Rights of entry.

General rules and maxims in construing deeds and wills.

We have now considered the several species of common assurances, whereby a title to lands and tenements may be

4. Contingent estates and possibilities—

except estates contingent as to the person; a joint tenant's chance of survivorship, and an expectant heir's chance of inheritance.	of every kind.

5. Not estates in tail, or quasi in tail.

6. Estates pour autre vie—

except estates pour autre vie in copyholds not specially limited; unless allowed by special custom.	of every kind.

7. Devisable property acquired after the date of the will—

except estates of freehold in lands of freehold, customary, or copyhold tenure.	with no exception.

II. WHO MAY BE TESTATORS.

1. Infants—

to execute powers simply collateral; to appoint guardians of their children; male infants of 14, and female of 12, to bequeath personalty.	not at all.

2. Married women, with husbands' assent, as to choses in action within husbands' power, and by special custom as to copyholds. Without assent, as to savings out of separate estate; and generally by ante-nuptial contract, or under a power.

3. Not idiots, lunatics, persons imbecile from whatever cause, or under the influence of fraud, delusion, or fear.

4. Not traitors nor felons, as to the legal estate in real or personal property; nor outlaws nor suicides, as to the legal right to personalty.

5. Aliens, as to personal estate, and, until office found, as to land.

III. THE FORMALITIES NECESSARY TO A WILL.

1. Writing—

except as to wills of personal estate by soldiers and seamen.

and except wills of personalty not exceeding 30*l.*, and parol wills of personalty to any amount, within the Statute of Frauds.	

transferred and conveyed from one man to another. But, before we conclude this head, it may not be improper to

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2. Signature by the testator, or in his presence, and by his direction—

except wills of personal estate and copyholds; and, perhaps, except testamentary appointments, under powers not requiring signature. But as to appointments of testamentary guardians, *in the presence* of two witnesses.

at the end; made or acknowledged by him in the joint presence of two witnesses.

3. Attestation—

a. As to freehold estates at law or in equity (including estates pour autre vie), by three credible witnesses, in the presence of the testator.
b. As to a devise *at law* of stock in the funds, by two credible witnesses.
c. As to appointments of guardians, by two credible witnesses.
d. In other cases, none.

by two witnesses, who must attest and subscribe the will in the presence of the testator.

Beneficial gifts by the will to witnesses, except charges of debts, void—

only as to wills containing devises of freehold estates.

and also beneficial gifts to wives or husbands of witnesses.

4. As to appointments, such further solemnities as the power may have prescribed.

IV. Revocation of Wills.

1. By express declaration—

a. By parol simply—as to nuncupative wills; devises of customary and copyhold property, appointments of guardians; and quære also devises of estates pour autre vie?
b. As to written wills of personalty—by parol, committed to writing, and proved by three witnesses to have been read to and allowed by the testator.
c. As to freehold property—by a will or codicil executed according to the Statute of Frauds, or by a revoking instrument, signed by the testator in the presence of three witnesses.

contained in a will or codicil, or revoking instrument executed as a will; except that wills of personal estate by soldiers or seamen may be revoked by parol.

take notice of a few general rules and maxims, which have been laid down by courts of justice for the construction and exposition of them all. These are,

2. By destruction, cancellation, &c.—

By an unattested destruction or cancellation of the will itself, or of the writing or part of it, with intent to revoke; but dependent on the validity of any substituted gifts, which, as to freeholds, &c., must have been attested.

a. By an unattested burning, tearing, or other destroying of the *substance* of the will with intent to revoke.

b. By an obliteration, interlineation, or alteration of the writing; duly attested.

3. Arising from change of circumstances.

a. Marriage of a testatrix.

b. Marriage of a testator, and birth of a child or children capable of benefiting by the revocation, arising from implication, and liable to be rebutted by circumstances as to personalty; semble, also, under special circumstances, by the birth of children by a wife taken before the will made.

Marriage of the testator or testatrix, operating by express enactment, and not affecting appointments of property which would not, in default of appointment, devolve on the testator's real or personal representatives.

4. By alterations in, or attempted dealings with, the property.

a. By interruption or destruction of the original seisin, except a disseisin by fraud, or followed by remitter of the testator. Except also, at law, a partition, and in equity, a mortgage.

b. By modification of the equitable ownership.

c. By an attempt to dispose differently of the property, failing from any other cause than fraud, or the disability of the testator.

To the extent only of an actual alienation, at law of the legal, in equity of the equitable ownership, subsisting at the testator's death.

V. Republication and Revival.

1. By parol—as to personal and copyhold property.

2. Republication as to copyholds, *but not revival*—by surrender to the use of the will.

3. By re-execution, with the formalities appropriate to the nature of the property.

4. By codicil to the will, but not so as to pass after-acquired lands, if the codicil in terms restricts the operation of the will to the lands originally devised.

5. Revival, but not republication—by cancellation of the revoking instrument.

Republication superfluous.

Revival only by re-execution duly attested, or by codicil duly attested, and shewing intention to revive.

1. That the construction be *favourable*, and as near the minds and apparent intents of the parties, as the rules of

1. Favourable to the apparent intent.

VI. The Time from which the Will speaks and takes Effect.

1. As to persons described in the will by name, or otherwise individually—from the date of the will.

2. As to persons described as a class—from the testator's death, unless a contrary meaning appear. But, as to illegitimate children—from the date of the will.

3. As to personalty—from the testator's death, except where gifts were held to be specific.

4. As to freeholds and copyholds—from the date of the will.

5. As to property of every kind—from the testator's death, unless restrained by the terms of a particular description.

VII. Lapse and Failure of Gifts.

Gifts to persons fail by their death in the testator's lifetime, notwithstanding a mere declaration that they shall not lapse.

1. Except a gift in joint-tenancy to several, of whom one, at least, survives the testator.

2. Except also a gift to a person in tail, or quasi in tail, who leaves issue in tail surviving the testator.

3. And except a gift of an absolute or transmissible interest to a child or other issue of the testator, who leaves issue surviving the testator.

For whose benefit—

1. If of a share in the residue, for the benefit of the real or personal representatives of the testator, according to the nature of the property.

2. Of a specific gift of freehold or copyhold—for the benefit of the heir; but of a mere charge on land—for the benefit of the devisee of that land.

3. Of a specific gift of personalty—for the benefit of the residuary legatee.

4. Of a specific gift—for the benefit of the residuary devisee or legatee.

VIII. What included in a general Devise of "Lands."

Freeholds and copyholds: if no freeholds nor copyholds to satisfy the devise, then leaseholds.

Freeholds, copyholds, and leaseholds.

law will admit [b]. For the maxims of law are, that, "*verba intentioni debent inservire;*" and "*benigne interpretamur chartas*

[b] And. 60.

IX. THE EXPRESSIONS NECESSARY TO EXECUTE A GENERAL POWER.

Any gift to be construed as necessarily referring to the power, or to the specific property which is the subject of it.	Any general gift which would carry the property under the ownership.

X. WHAT ESTATE PASSES BY A GENERAL GIFT WITHOUT WORDS OF LIMITATION.

1. The absolute interest in personalty, including leaseholds.

2. A life estate in other property, unless words are used which shew an intent to pass the fee.	The absolute interest; or fee-simple in property of every kind.

XI. CONSTRUCTION OF THE WORDS "DIE WITHOUT ISSUE," &c.

Such words mean an *indefinite* failure of issue, unless expressions or circumstances indicate a contrary intent.	Such words mean a failure of issue *at the death* of the ancestor named, unless a contrary intent appear.

XII. EFFECT OF AN INDEFINITE DEVISE TO TRUSTEES.

It passed such an estate as would be commensurate with the trusts.	Unless upon a trust confined to a life or lives, it passes the fee.

THE DEVOLUTION, &c. OF UNDEVISED ESTATES POUR AUTRE VIE.

As to estates pour autre vie of persons dying before January, 1838.	*As to estates pour autre vie of persons dying after December*, 1837.

If limited in special occupancy—to the occupant named.

If not so limited—to the personal representative of the last owner,

except copyholds and customary freeholds,

chargeable in the hands of the devisee or heir as real assets, and chargeable and distributable in the hands of the personal representatives as personal assets—

except copyholds and customary freeholds,

not chargeable in the hands of an heir quasi in tail.

The reader will find an able commentary on the Statute of Wills in Mr. Hayes's Introduction to Conveyancing; and if he wishes to exhaust the subject of wills in general, he will resort to Mr. Jarman's admirable Treatise, now completed.

propter simplicitatem laicorum." And therefore the construction must also be *reasonable,* and agreeable to common understanding [c].

2. That *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* [d]: but that where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of *words; nam qui haeret in litera, haeret in cortice.* Therefore, by a grant of a remainder a reversion may well pass, and *e converso* [e]. And another maxim of law is, that *"mala grammatica non vitiat chartam;"* neither false English nor bad Latin will destroy a deed [f]. Which, perhaps, a classical critic may think to be no unnecessary caution. 2. As to literal constructions.

3. That the construction be made upon the entire deed, and not merely upon disjointed parts of it. *"Nam ex antecedentibus et consequentibus fit optima interpretatio* [g]." And therefore that every part of it be (if possible) made to take effect; and no word but what may operate in some shape or other [h]. *"Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat* [i] [13]. 3. Every part must take effect if possible. [380]

[c] 1 Bulstr. 175. Hob. 304.
[d] 2 Saund. 157.
[e] Hob. 27.
[f] 10 Rep. 133. Co. Litt. 223. 2 Show. 334.
[g] 1 Bulstr. 101.
[h] 1 P. Wms. 457.
[i] Plowd. 156.

(13) This maxim rather illustrates the first of Blackstone's rules of construction than that under which he cites it. (See Shepp. Touch. 82, et seq.; 6 Nev. & M. 292). "Benignæ faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat." "Verba intentioni et non e contrà debent inservire." Therefore deeds which are intended and made to operate one way, may operate another way, if the intention of the parties cannot take place unless they operate a different way from that intended; so that a deed intended for a release, if (for want of privity of estate or otherwise) it cannot operate as such, may amount to a grant of a reversion, an attornment, or a surrender, and so e converso; for though the grantor's intent is to be regarded, as to what estate is to pass, and to whom, it is not at all to be regarded as to the manner of passing it, of which he is supposed to be ignorant. (*Roe* v. *Tranmarr*, Willes, 682; 2 Smith's Leading Cases, 288; 5 Moo. & P. 790; 2 Mee. & W. 516). It seems to have been a maxim formerly, that, if a deed was capable of operating either at the common law or under the Statute of Uses, it should be held to take effect at the common law; although by so doing some ulterior intention of the parties would be defeated. But this rule is not now followed; and even when the apparent intent may be equally

4. Deed must be taken most strongly against the contractor, or grantor.

4. That the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party. "*Verba fortius accipiuntur contra proferentem.*" As, if tenant in fee-simple grants to any one an estate for life, generally, it shall be construed an estate for the life of the grantee[j]. For the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words: and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between an indenture and a deed-poll: for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But, in a deed-poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him[k] [14]. And, in general, this rule, being a rule of some strictness and rigor, is the last to be resorted to; and is never to be relied upon, but where all other rules of exposition fail[l] [15].

5. The sense agreeable to law must be preferred.

5. That, if the words will bear two senses, one agreeable to, and another against, law, that sense be preferred, which is most agreeable thereto[m]. As if tenant in tail lets a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.

[j] Co. Litt. 42.
[k] Ibid. 134.
[l] Bacon's Elem. c. 3.
[m] Co. Litt. 42.

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effectuated either way, it seems that the grantor shall have his option which way to take the estate. (Id.; Shepp. Touch. by Prest. 83; 1 Moo. & Sc. 199; 2 Cr. & J. 142; see 6 East, 302; 2 Wms. Saund. 97 a).

443. The distinction does not, however, appear to be recognised at the present day, and the rule of construing most strictly against the grantor, has frequently been applied to indentures. (5 B. & A. 542).

(14) Plowd. 134 a.; 5 Scott, N. R.

(15) 1 Mee. & W. 336.

6. That, in a deed, if there be two clauses so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected [n]: wherein it differs from a will; for there, of two such repugnant clauses, the latter shall stand [o]. Which is owing to the different natures of the two instruments; for the first deed and the last will are always most available in law [16]. Yet in both cases we should rather attempt to reconcile them [p].

6. In a deed, the *first* of two repugnant clauses shall stand, in a will, the *last*.

7. That a devise be most favourably expounded to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal or proper phrases. And therefore many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus, a fee may be conveyed without words of inheritance [q]; and an estate-tail without words of procreation [r] [17]. By a will also an estate may pass by mere im-

7. A devise must be expounded to pursue the devisor's intention.

[n] Hardr. 94. [o] Co. Litt. 112. [p] Cro. Eliz. 420. 1 Vern. 30.
[q] See page 108. [r] See page 115.

(16) Such was held to be the law in the time of Lord Coke; but now, where the same estate is devised to A. in fee, and afterwards to B. in fee in the same will, they are construed to take the estate as joint-tenants, or tenants in common, according to the limitations of the estates and interests devised. (3 Atk. 493; Harg. Co. Litt. 112. b., n. 1).—[CHRISTIAN.] See 2 Taunt. 109; 2 Myl. & K. 149; 1 M. & W. 677; 2 B. & C. 197; 5 Id. 847).

(17) In the celebrated case of *Perrin* v. *Blake*, (Burr. 2579), the question was, whether the manifest intention of the testator to give to the first taker an estate for life only ought to prevail, or that he should have an estate-tail from the construction which would have clearly been put upon the same words if they had been used in a deed. The devise in substance was as follows: the testator declared, it is my intent and meaning, that none of my children should sell or dispose of my estate for longer term than his own life; and *to that intent* I give my son John Williams my estate during his natural life, remainder to my brother-in-law during the life of my son John Williams (the design of that being to support the contingent remainder); remainder to the heirs of the body of John Williams. Lord Mansfield and two other judges of the court of King's Bench determined, that John Williams took an estate for life only; but upon a writ of error to the Exchequer-chamber, the decision was reversed, and six out of eight of the other judges held, that John Williams took an estate-tail, which of consequence gave him an absolute power of *selling or disposing of* the estate as he pleased. The discussion of this subject called forth a splendid display of legal learning and ingenuity. Yet it has since been observed by a learned judge, that as one of the judges held that John Williams took an estate-tail, because he was of opinion that such might be presumed to be the testator's

plication, without any express words to direct its course. As, where a man devises lands to his heir-at-law, after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication [s]; for the intent of the testator is clearly to postpone the heir till after her death; and, if she does not take it, nobody else can. So, also, where a devise is of black-acre to A and of white-acre to B in tail, and if they both die without issue, then to C in fee; here A and B have *cross-remainders* by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C's remainder over shall be postponed till the issue of both shall fail [t]. But, to avoid confusion, no such cross remainders are allowed between more than two devisees [u] [18]:

[s] H. 13 Hen. VII. 17. 1 Ventr. 376.
[t] Freem. 484.
[u] Cro. Jac. 655. 1 Ventr. 224. 2 Show. 139.

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intention, no argument in future can be drawn from this case; because one-half of the judges relied upon the ground of intention alone. And the editor entirely concurs with that learned judge, that it is the first and great rule in the exposition of wills, and to which all other rules must bend, that the intention of the testator, expressed in his will, shall prevail, provided it be *consistent with the rules of law;* that is, provided it can be effectuated consistently with the limits and bounds which the law prescribes. To argue that the intention shall be frustrated by a *rule of construction of certain words*, is to say that the intention shall be defeated by the use of the very words which the testator has adopted as the best to communicate his intention, and of which the sense is intelligible to all mankind.

Where technical phrases and terms of art are used alone by a testator, it is fair to presume that he knew their artificial import and signification, and that such was his will and intention; but where he happens to introduce them, and at the same time in effect declares that I do not intend what conveyancers understand by these words, but my intention is to dispose of my estate directly contrary to the construction generally put upon them; surely courts of justice are, or ought to be, as much at liberty, or rather under an obligation, to effectuate that intention as far as the law will admit, as if he had expressed it in the most apt and appropriate language. (1 Bl. Rep. 672; 4 Burr. 2579; Doug. 329; Fearne, 113; Harg. Tracts, 351, 490).—[CHRISTIAN.] (See 2 Jarm. Wills, 246; and, as to the doctrine of general and particular intention, see Id. 399).

(18) The contrary has for some time been fully established; and this has been laid down by Lord Mansfield as a general rule, *viz.* wherever cross remainders are to be raised between two and no more, the favourable presumption is in support of cross remainders: where between more than two, the presumption is against them; but the intention of the testator may defeat the presumption in either case.

And the editor conceives that cross remainders would be raised in every case, in which it appears to be the testator's intention that the subsequent

and, in general, where any implications are allowed, they must be such as are *necessary* (or at least highly *probable*) and not merely *possible* implications [w]. And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses [x], is construed in each with equal favour and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law [19]. [382]

[w] Vaugh. 262. [x] Fitzg. 236. 11 Mod. 153.

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devisee shall take nothing till the issue of all the first devisees are extinct. (Cowp. 777, 797; 4 T. R. 710).

In a case, where cross remainders were created by a deed, Lord Kenyon declared, that "no technical precise form of words is necessary to create cross remainders, though in the verboseness of conveyancers an abundance of words is generally introduced in deeds for this purpose." (5 T. R. 431). But cross remainders cannot be created in a deed, as in a will, by implication, not even where the ultimate limitation is given "in default of all such issue," which words would probably create cross remainders amongst any number in a will. (5 T. R. 521; 1 East, 416; 4 Russ. 78).

In a will there may be cross remainders amongst any number by implication, where it is the manifest intention of the testator, though he has given the estates to the *respective* heirs of their bodies. (2 East, 36).—[CHRISTIAN.] (See 1 Taunt. 234; 2 Jarm. Wills, 457.)

(19) Parol evidence may, under particular circumstances, be admitted to explain and even to control written instruments; and the rules by which the admission of such evidence is regulated form one of the most interesting branches of the law. Although the common law confounded words merely spoken, and words written but unsealed, under the common designation of *parolx* or parol, as distinguished from *writings* par excellence, or deeds; yet it is an ancient rule, that if a contract has been reduced to writing, though not sealed, verbal evidence shall not be given of what passed between the parties either before the written instrument was made, or while it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract. But after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing (unless the matter agreed upon is required by some statute to be in writing, or unless the former agreement was by deed, in which latter case it can only be dissolved or varied by cancellation or by another deed, 5 Rep. 26), either altogether to waive or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify, the terms of it, and thus to make a new agreement, which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what is left of it. (2 Nev. & M. 33; 12 East, 6; 5 Scott, N. R. 249).

The rule is, that evidence shall not be admitted to *contradict* or *vary* the terms of a deed or writing; and therefore it allows of parol evidence in two cases.—Firstly, where, by reason of some fraud, or some agreement against the policy of the law, the written contract is void as against any party or altogether, of which fraud or illegality parol evidence may be given so as to

Recapitulation.

And thus we have taken a transient view, in this and the three preceding chapters, of a very large and diffusive sub-

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defeat the written contract; for this evidence does not tend to shew that the contract was not such as it appears in the writing, but proves that by reason of some extrinsic circumstance it was void. (Cowp. 117; 7 Scott, 341; 6 Mee. & W. 358). So, where the interests of third persons are concerned, parol evidence to contradict a deed or writing may be given. (3 T. R. 474; 4 Nev. & M. 406). In equity, clear parol evidence even of mistake (to insist on which is a kind of fraud) is allowed to vary a writing, notwithstanding the Statute of Frauds. (1 Cox, 404; 5 Cro. 600; 6 Ves. 328; 14 Ves. 524). Secondly, where the writing is incomplete, and does not contain all the terms of the contract, parol evidence, not to contradict what is written, but to supply what is defective, will be admitted, at least where the writing does not purport to contain the complete agreement. (1 Cox, 402; 1 Stark. 267, 319; 2 Camp. 521; 17 Ves. 192; 14 Id. 170; 8 Scott, 156; 5 Nev. & M. 209). Of course, if the agreement is such as is required by the Statute of Frauds to be in writing, the writing is not complete, unless it contain the whole agreement; and parol evidence, in such case, is inadmissible. (Ante, p. 306, n.).

An agreement under seal can only be released by deed, or after breach by acceptance of something in lieu of damages; which accord and satisfaction is the only means, besides a release under seal, by which any right of action, though arising out of a mere oral contract, can be discharged. (Vin. Ab. *Contract*, G. 17; 6 Rep. 43 b; Cro. Car. 383; 1 East, 619; 1 J. B. Moore, 371; 2 B. & Cr. 821; 4 Moo. & P. 791). So, an agreement, of a nature which, under the Statute of Frauds, renders writing necessary, cannot be subsequently *varied* by parol, (6 Nev. & M. 754; 5 Scott, 196; see 7 Taunt. 157); although, if such parol variation is acted upon by one party, he may thus acquire a right in equity to enforce performance on the other side. (Vin. Ab. *Contract*, H. 37; 3 Myl. & K. 269). It seems that a written contract within the Statute of Frauds may be abandoned or waived by parol, and a parol agreement to vary the terms of a written contract, though void as a substituted contract, has been held to amount to a waiver of the original contract. (2 Per. & D. 447; 6 Mee. & W. 109.)

The admissibility of parol evidence in aid of the *construction* of writing depends upon rules of universal application, whether the writing under consideration be sealed or unsealed, made inter vivos or testamentary. (1 T. R. 701; 3 Id. 473; 3 Ad. & E. 131). The court must always, as far as possible, place itself in the position of the parties to the instrument; it must acquaint itself whenever that is necessary with the meaning which the parties *habitually* affixed to the words used by them; it must know what circumstances were known by them and what unknown, in order to ascertain, not what they *intended* to put into writing, but *what meaning they attached to the words* actually used by them; and in order to obtain this information parol evidence may be resorted to. (1 Ves. 231, 259; 15 Id. 514; 5 B. & Ad. 127, 663). If the writing is in an antient character, or in a foreign language, its purport is ascertained by the testimony of persons skilled in the character or language. (1 P. Wms. 425; 3 Sim. 24). If it contains technical expressions, they are to be explained by competent witnesses; and even ordinary words, if it appear on the face of the writing or by averment, that they must have been used in a technical sense, may be so interpreted. (4 Nev. & M. 602; 1 M. & W. 343; 5 Id. 335; 3 B. & Ad. 728; 1 Gale & D. 54; 4 Scott, N. R. 378. See, as to evidence of mercantile and

ject, the doctrine of common assurances: which concludes our observations on the *title* to things real, or the means by

local usages, 2 Scott, 581; 1 Mee. & W. 466; 2 Cr. & J. 244).

Parol evidence must also be more or less relied upon in every case, for the purpose of applying the words of the writing to the facts of the case. Thus, before a conveyance of "the manor of G." to "A. B." can be acted upon, it must be shewn to what estate that description is applicable, and who is A. B. (Bunb. 274; 1 Ves. sen. 231; 3 Myl. & K. 350).

Having ascertained, by reference to extrinsic circumstances, if necessary, what is the strict and primary meaning which the words of the instrument bear in the abstract; the next step is to apply them to the particular circumstances of the case, and if a distinct and reasonable meaning can be given to them with reference to those circumstances, no evidence of intention shall be allowed to shew that, in fact, they were used in a different sense. (1 Br. C. C. 31; 1 N. R. 113; 5 Scott, N. R. 958). But if the words so interpreted cannot be reasonably applied to any existing circumstances, the court will take into consideration all the circumstances, and among other things will admit, if necessary, evidence as to what matters were within the knowledge, memory, or contemplation of the parties at the time, and see whether any meaning can be reasonably attributed to the words which is not their primary meaning, so as to give them effect with reference to the actual circumstances. (7 B. P. C. 445; T. & R. 352; 1 Cr. & M. 832; Jac. 463). If the words on the face of them are indeterminate, and do not grammatically import one ascertained person or thing, as where a gift is made to one of the sons of A., (2 Vern. 624), of course parol evidence is inadmissible to remove this patent ambiguity; but if the words are grammatically determinate in sense, and are only found upon reference to extrinsic circumstances to be applicable indifferently to two objects (as where there is a gift to J. S., and there are two persons of that name), it is concluded that only one of those meanings could have been at the time present to the mind of the person making use of the words, and evidence is admitted to shew what meaning was so present; for this purpose evidence even of the party's own contemporary declarations of intention may be received. This is expressed by the maxim, *ambiguitas verborum latens, verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur.* (Bacon's Maxims, Reg. 23; 5 Rep. 68; 8 Rep. 155; 1 Moo. & Sc. 342; 2 Mee. & W. 129; 5 Id. 363; 4 Per. & D. 193, 220). Although patent ambiguities, in point of grammatical expression, cannot be removed by extrinsic evidence, a clause, which is complete in itself, and expresses a distinct unambiguous intention, will not be taken out of the reach of parol explanation by a wholly distinct clause in the same instrument disclosing facts upon which the ambiguity arises. Thus, where a gift was made to George Gord the son of Gord, and there was a George the son of George Gord, and a George the son of John Gord, evidence of intention was received to shew which was meant, although these facts appeared by other parts of the will itself. (2 Mee. & W. 127). And even a mere inaccuracy or obscurity, though patent, may be explained by reference to extrinsic *circumstances;* for though words which it must be concluded were inexpressive or ambiguous to the apprehension of the parties themselves, cannot be eked out by evidence of *intention*, yet the writing itself is not conclusive evidence that the words were so deficient in meaning: and extrinsic facts may be looked to for the purpose of discovering whether words, apparently senseless or

which they may be reciprocally lost and acquired. We have before considered the *estates* which may be had in them,

ambiguous, had a definite meaning in the minds of those who used them. Thus, effect has been given, upon evidence of the facts, to so ambiguous a gift as the following:—"I give, &c., to be divided into four parts—between one child of T. D., one child of S. B., one child of A. D., and one child of M. D." (1 Beav. 532). So, *falsa demonstratio non nocet*, that is to say, words which have no meaning at all with reference to the facts may be rejected, for the purpose of giving effect to words with which they are associated, and which have a certain meaning. (Bac. Max., reg. 25, 13; Godb. 131; 2 Vern. 593; 11 Sim. 467; 11 Mee. & W. 183).

A branch of this subject has been treated with consummate ability, in Mr. (now Sir James) Wigram's work on "The Admission of Extrinsic Evidence in Aid of the Interpretation of Wills." The learned author has deduced from the authorities the following seven propositions, which, though he has confined his inquiry to the subject of wills, seem to be equally applicable to the interpretation of deeds and other instruments.

I. "A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed."

II. "Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words, so interpreted, are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

III. "Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable."

IV. "Where the characters in which a will is written are difficult to be decyphered, or the language of the will is not understood by the court, the evidence of persons skilled in decyphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the court of the proper meaning of the words."

V. "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

"The same (it is conceived) is true

with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connections of the persons entitled to hold them, we have examined the *tenures*, both antient and modern, whereby those estates have been, and are now, holden: and have distinguished the object of all these inquiries, namely, things real, into the corporeal or substantial, and incorporeal or ideal *kind;* and have thus considered the rights of real property in every light wherein they are contemplated by the laws of England. A system of laws that differs much from every other system, except those of the same feodal origin, in its notions and regulations of landed estates; and which therefore could in this particular be very seldom compared with any other.

Concluding observations.

The subject which has thus employed our attention is of very extensive use, and of as extensive variety. And yet, I am afraid, it has afforded the student less amusement and pleasure in the pursuit, than the matters discussed in the preceding volume. To say the truth, the vast alterations which the doctrine of real property has undergone from the conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon another for a course of seven centuries, without any order or method; and the multiplicity of acts [383]

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of every other disputed point, respecting which it can be shewn, that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words."

[In commenting on this proposition, a *material* fact is defined to be any fact, which, *according to the ordinary rules of evidence*, tends to shew which of the Propositions II. and III. the *circumstances* of the case render applicable; in other words, whether the words, being strictly construed, have or have not a definite and reasonable meaning, with reference to the actual circumstances.]

VI. "Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (*except in certain cases, see Prop. VII.*) will be void for uncertainty."

VII. "Notwithstanding the rule of law which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law in certain special cases admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

"These cases may be thus defined:—Where the object of a testator's bounty, or the subject of disposition, (*i. e.* the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator."

of parliament which have amended, or sometimes only altered, the common law: these causes have made the study of this branch of our national jurisprudence a little perplexed and intricate. It hath been my endeavour[o] principally to select such parts of it as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet I cannot presume that I have always been thoroughly intelligible to such of my readers as were before strangers even to the very terms of art, which I have been obliged to make use of; though, whenever those have first occurred, I have generally attempted a short explication of their meaning. These are indeed the more numerous, on account of the different languages which our law has at different periods been taught to speak; the difficulty arising from which will insensibly diminish by use and familiar acquaintance. And therefore I shall close this branch of our inquiries with the words of Sir Edward Coke[y]: "Albeit the student shall not at any one day, do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself but proceed; for on some other day, in some other place," (or perhaps upon a second perusal of the same) "his doubts will be probably removed."

[y] Proeme to 1 Inst.

CHAPTER XXIV.

OF THINGS PERSONAL.

UNDER the name of things *personal* are included all sorts of things *moveable,* which may attend a man's person wherever he goes; and therefore, being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and *immoveable,* as, lands and houses, and the profits issuing thereout. These, being constantly within the reach, and under the protection of the law, were the principal favourites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded as only a transient commodity. The amount of it, indeed, was comparatively very trifling during the scarcity of money and the ignorance of luxurious refinements which prevailed in the feodal ages. Hence it was, that a tax of the *fifteenth, tenth,* or sometimes a much larger proportion, of all the moveables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our antient historians, though now it would justly alarm our opulent merchants and stock-holders. And hence, likewise, may be derived the frequent forfeitures inflicted by the common law, of *all* a man's goods and chattels, for misbehaviours and inadvertencies that at present hardly seem to deserve so severe a punishment. Our antient law-books, which are founded upon the feodal provisions, do not therefore often condescend to regulate this species of property. There is not a chapter in Britton or

What are things personal.

Personal estate little regarded in former times.

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the mirroir, that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton, and Fleta, seems principally borrowed from the civilians. But, of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity and of course its value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and less technical mode of considering the one than the other; frequently drawn from the rules which they found already established by the Roman law, whereever those rules appear to be well-grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times; preserving withal a due regard to antient usages, and a certain feodal tincture, which is still to be found in some branches of personal property.

Chattels include certain estates in things immoveable.

But things personal, by our law, do not only include things *moveable,* but also something more: the whole of which is comprehended under the general name of *chattels,* which, Sir Edward Coke says[a], is a French word signifying goods. The appellation is in truth derived from the technical Latin word *catalla*; which primarily signified only beasts of husbandry, or (as we still call them) *cattle,* but in its secondary sense was applied to all moveables in general[b]. In the *grand coustumier* of Normandy[c], a *chattel* is described as a mere moveable, but at the same time it is set in opposition to a fief or feud: so that, not only goods, but whatever was not a feud, were accounted chattels. And
[386] it is in this latter, more extended, negative sense, that our law adopts it; the idea of goods, or moveables only, being not sufficiently comprehensive to take in every thing that the law considers as a chattel interest. For since, as the commentator on the *coustumier*[d] observes, there are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these qualities is not, according to the Normans, an heritage

[a] 1 Inst. 118.
[b] Dufresne, II. 409.
[c] C. 87.
[d] *Il conviendroit quil fust non mouuable et de duree a tousiours.* Fol. 107. a.

or fief; or, according to us, is not a *real* estate: the consequence of which, in both laws is, that it must be a personal estate, or chattel.

Chattels, therefore, are distributed by the law into two kinds, chattels *real*, and chattels *personal*[e]. Two kinds of chattels.

1. Chattels *real*, saith Sir Edward Coke[f], are such as concern, or savour of, the realty; as terms for years of land, wardship in chivalry (while the military tenures subsisted), the next presentation to a church, estates by statute-merchant, statute-staple, *elegit*, or the like; of all which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to, real estates: of which they have one quality, viz. immobility, which denominates them *real;* but want the other, viz. a sufficient, legal indeterminate duration: and this want it is, that constitutes them *chattels*. The utmost period for which they can last, is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life: their tenants were considered upon feodal principles, as merely bailiffs or farmers; and the tenant of the freehold might at any time have destroyed their interest, till the reign of Henry VIII.[g] A freehold, which alone is a real estate, and seems (as has been said) to answer to the fief in Normandy, is conveyed by corporal investiture and livery of seisin; which gives the tenant so strong a hold of the land, that it never after can be wrested from him during his life, but by his own act of voluntary transfer or of forfeiture; or else by the happening of some future contingency, as, in estates *pur auter vie*, and the determinable freeholds mentioned in a former chapter[h]. And even these, being of an uncertain duration, may, by possibility, last for the owner's life: for the law will not presuppose the contingency to happen before it actually does, and 1. Chattels real. [387]

[e] So too in the Norman law, *Cateux sont meubles et immeubles; si comme vrais meubles sont qui transporter se peuvent, et ensuivir le corps; immeubles sont choses qui ne peuvent ensuivir le corps, niestre transportees, et tout ce qui n'est point en heritage.* LL. Will. Nothi, c. 4. apud Dufresne, II. 409.

[f] 1 Inst. 118.

[g] See page 142.

[h] Page 120.

till then the estate is to all intents and purposes a life estate; and therefore a freehold interest. On the other hand, a chattel interest in lands, which the Normans put in opposition to fief, and we to freehold, is conveyed by no seisin or corporal investiture, but the possession is gained by the mere entry of the tenant himself; and it will certainly expire at a time prefixed and determined, if not sooner. Thus a lease for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estates by statutes and *elegit* are determined as soon as the debt is paid; and so guardianships in chivalry expired, of course, the moment that the heir came of age. And if there be any other chattel real, it will be found to correspond with the rest in this essential quality, that it's duration is limited to a time certain, beyond which it cannot subsist[1].

2. Chattels personal.

2. Chattels *personal* are, properly and strictly speaking, things *moveable;* which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household-stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chattels real, and their incidents, in the former chapters which were employed upon real estates: that kind of property being of a mongrel amphibious nature, originally endowed with one only of the characteristics of each species of things;

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(1) It is a rule of the law of England, in common with that of most other nations, that the title by succession to personal property, wherever it is situated, shall be determined by the law of the domicile of the deceased owner. (1 H. Bl. 670; 5 Ves. 750; 5 B. & Cr. 451; 1 Hagg. 474, 498; 8 Sim. 310). But it has been denied by a justly-esteemed writer, that this rule extends to chattels *real*, on the ground that the treatment of such property as personalty is peculiar to our own law. (1 Jarm. Wills, 4; 2 Id. 740). The point appears to be unaffected by decision, and is perhaps open to argument on both sides. (See 2 P. Wms. 622).

the immobility of things real, and the precarious duration of things personal.

Chattel interests being thus distinguished and distributed, it will be proper to consider, first, the nature of that *property*, or dominion, to which they are liable; which must be principally, nay solely, referred to personal chattels: and, secondly, the *title* to that property, or how it may be lost and acquired. Of each of these in it's order. The subject divided.

CHAPTER XXV.

OF PROPERTY IN THINGS PERSONAL.

Property in things personal considered, 1st. as to the quantity of interest.

PROPERTY, in chattels personal, may be either in *possession;* which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or else it is in *action;* where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession,* is divided into two sorts, an *absolute* and a *qualified* property.

I. In possession, absolute property.

I. First then of property in *possession absolute;* which is where a man hath, solely and exclusively, the right, and also the occupation, of any moveable chattels; so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like: such also may be all *vegetable* productions, as the fruit or other parts of a plant, when severed from the body of it; or the whole plant itself, when severed from the ground; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy. Of these therefore there remains little to be said.

Property in animals.

But with regard to *animals,* which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another, there is a great difference made with respect to their several classes, not only in our law, but in the law of nature and of all civilized nations. They are distinguished into such as are *domitae,* and such as are *ferae naturae:* some being of a *tame* and others of a *wild* disposition. In such as are of a nature tame and domestic (as horses, kine, sheep, poultry, and the like), a man may have as absolute a pro-

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Animals are either domitæ, or feræ naturæ.

perty as in any inanimate beings; because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property[a]: in which our law agrees with the laws of France and Holland[b]. The stealing, or forcible abduction, of such property as this, is also felony; for these are things of intrinsic value, serving for the food of man, or else for the uses of husbandry[c]. But in animals *ferae naturae* a man can have no absolute property[1].

Property in the young of tame animals.

Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that "*partus sequitur ventrem*" in the brute creation, though for the most part in the human species it disallows that maxim. And therefore, in the laws of England[d], as well as Rome[e], "*si equam meam equus tuus praegnantem fecerit, non est tuum sed meum quod natum est.*" And, for this Puffendorff[f] gives a sensible reason: not only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with greater expense and care: wherefore, as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young eygnets; which belong equally to the owner of the cock and hen, and shall be divided between them[g]. But here the reasons of the general rule cease, and "*cessante ratione cessat et ipsa lex:*" for the male is well known, by his constant association with the female; and for the same reason the owner of the one doth not suffer more disadvantage during the time of pregnancy and nurture, than the owner of the other.

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II. Qualified, limited, or special property.

II. Other animals, that are not of a tame and domestic nature, are either not the objects of property at all, or else

[a] 2 Mod. 319.
[b] Vin. in Inst. l. 2. tit. 1. § 15.
[c] 1 Hal. P. C. 511, 512.
[d] Bro. Abr. tit. *Propertie*, 29.
[e] Ff. 6. 1. 5.
[f] L. of N. l. 4, c. 7.
[g] 7 Rep. 17.

(1) See 2 B. & Cr. 937.

fall under our other division, namely, that of *qualified, limited,* or *special* property: which is such as is not in its nature permanent, but may sometimes subsist, and at other times not subsist. In discussing which subject, I shall in the first place shew, how this species of property may subsist in such animals as are *ferae naturae,* or of a wild nature; and then, how it may subsist in any other things, when under particular circumstances.

First, in animals feræ naturæ.

First, then, a man may be invested with a qualified, but not an absolute, property in all creatures that are *ferae naturae,* either *per industriam, propter impotentiam,* or *propter privilegium.*

1. Qualified property per industriam.

1. A qualified property may subsist in animals *ferae naturae, per industriam hominis:* by a man's *reclaiming* and making them tame by art, industry, and education[2]; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom: as horses, swine, and other cattle; which, if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestick by use and familiarity; and are therefore, say they, called *mansueta, quasi manui assueta.* But however well this notion may be founded, abstractedly considered, our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitae* [392] *naturae:* and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *ferae naturae,* though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an inclosed warren, doves in a dovehouse, pheasants or partridges in a

(2) See in general the observations of Mr. Justice Bayley, 2 B. & C. 937; Com. Dig. *Biens* (F.), and *Action sur Trover,* (C.); and 1 Saund. 84. Trover lies for a parrot or monkey, because they are merchandise, and valuable; (Cro. J. 262); but indictment does not lie for stealing a tamed ferret. (Russ. & R. C. C. 350).—[CHITTY.] (See stat. 7 & 8 Geo. 4, c. 29, s. 31).

mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi*, which is only to be known by their usual custom of returning [h] [3]. A maxim which is borrowed from the civil law [i]; "*revertendi animum videntur de-*" *sinere habere tunc, cum revertendi consuetudinem deserue-*" *rint.*" The law therefore extends this possession farther than the mere manual occupation; for my tame hawk, that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he hath *animum revertendi*. So are my pigeons, that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester; all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them [k]. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure; or, if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him [l]; but otherwise, if the deer has been long absent without returning, or the swan leaves the neighbourhood. Bees also are *ferae naturae*; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law [m]. And to the same purpose, not to say in the same words with the civil law, speaks Bracton [n]: occupation, that is, hiving or including them, gives the property in bees; for, though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nest there-

Bees.

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[h] Bracton, l. 2, c. 1. 7 Rep. 17. Crompt. of Courts, 167. 7 Rep. 16.
[i] Inst. 2. 1. 15.
[k] Finch. L. 177.
[m] Puff. l. 4, c. 6, § 5. Inst. 2. 1. 14.
[n] l. 2, c. 1, § 3.

(3) See 4 Car. & P. 131.

on; and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is entitled to take them. But it hath been also said[o], that with us the only ownership in bees is *ratione soli;* and the charter of the forest[p], which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found[4].

In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible: a property, that may be destroyed if they resume their antient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *ferae naturae* again; and are free and open to the first occupant that has ability to seize them. But while they thus

[o] Bro. Abr. tit. *Propertie*, 37. cites 43 Edw. III. 24.
[p] 9 Hen. III. c. 13.

(4) With respect to *rooks*, it has been determined, that no action is sustainable against a person for maliciously causing loaded guns to be discharged near a neighbour's close and trees, and thereby disturbing and driving away the rooks which used to resort to and have young in the same; inasmuch as rooks are a species of birds feræ naturæ, destructive in their habits, not properly an article of food, and not protected by any act of Parliament, and that the plaintiff therefore could not have any property in them. (2 Barn. & C. 934; 4 Dowl. & R. 518, S. C.). But an action on the case lies for discharging guns near the *decoy-pond* of another, with design to damnify the owner by frightening away the wild fowl resorting thereto, by which the wild fowl are frightened away, and the owner damnified; for wild fowl are protected by the 25 Hen. VIII. c. 11, and they constitute a known article of food; and a person keeping up a decoy expends money and employs skill in taking that which is of use to the public. It is a profitable mode of employing his land, and was considered by Lord Holt as a description of trade. (11 East, 574; 2 B. & C. 943). Other animals are specially protected by acts of Parliament, as hawks, falcons, swans, partridges, pheasants, pigeons, wild ducks, mallards, teal, widgeons, wild geese, black game, red game, bustards, and herons, and consequently, in the eye of the law, are fit to be preserved. Bees are property, and the subject of larceny. (Per Bayley, J., 2 B. & C. 994; Sir T. Raym. 33).—[CHITTY.] (See stat. 6 & 7 Geo. 4, c. 29, s. 31, which extends to the stealing of any beast or bird ordinarily kept in confinement. As to fish, see Id. ss. 34, 35, 36; 7 Will. 4 & 1 Vict. c. 90, s. 5. As to game, see 9 Geo. 4, c. 69; 1 & 2 Will. 4, c. 32).

continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine; and an action will lie against any man that detains them from me, or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food, as it is to steal tame animals[q]: but not so, if they are only kept for pleasure, curiosity, or whim, as dogs[5], bears, cats, apes, parrots, and singing birds[r]; because their value is not intrinsic, but depending only on the caprice of the owner[s]; though it is such an invasion of property as may amount to a civil injury, and be redressed by a civil action[t]. Yet to steal a reclaimed hawk is felony both by common law and statute[u]; which seems to be a relic of the tyranny of our antient sportsmen[6]. And, among our elder ancestors, the antient Britons, another species of reclaimed animals, viz. cats, were looked upon as creatures of intrinsic value; and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the king's household, and was the *custos horrei regii*, for which there was a very peculiar forfeiture[w]. And thus much of qualified property in wild animals, reclaimed *per industriam.*

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[q] 1 Hal. P. C. 512.

[r] Lamb. Eiren. 275.

[s] 7 Rep. 18. 3 Inst. 109.

[t] Bro. Abr. tit. *Trespass*, 407.

[u] 1 Hal. P. C. 512. 1 Hawk. P. C. c. 33.

[w] "*Si quis felem, horrei regii custodem, occiderit vel furto abstulerit, felis summâ caudâ suspendatur, capite aream attingente, et in eam grana tritici effundantur, usquedum summitas caudae tritico co-operiatur.*" Wotton, LL. Wall. l. 3, c. 5, § 5. An amercement similar to which, Sir Edward Coke tells us (7 Rep. 18.) there antiently was for stealing swans; only suspending them by the beak, instead of the tail.

(5) Dogs, from their participation in the recreations of the chase, and their disposition to roam through forests and attack game, became the subject of legislation in an early period of our history. No person could keep a dog (which commonly meant a mastiff) without license from the king; and such as were kept within any forest, for the safety of house and lands, were required to be *expeditated*, that is, to have three claws of the fore foot cut off. But the law gradually relaxed, with the disafforesting statutes, till these provisions became obsolete. (See Com. Dig. *Chase*, (M.)). The stealing or harbouring of a stolen dog is punishable, under the 6 & 7 Geo. 4, c. 29, ss. 31, 32, by pecuniary penalty of not exceeding 20*l.* over and above the value of the animal. (Burn, Just. tit. *Dogs*).

(6) The statute on this subject was repealed by the 7 & 8 Geo. 4, c. 27.

2. Qualified property, propter impotentiam.

2. A qualified property may also subsist with relation to animals *ferae naturae, ratione impotentiae,* on account of their own inability. As when hawks, herons, or other birds build in my trees, or coneys or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires [x]: but, till then, it is in some cases trespass, and in others felony, for a stranger to take them away [y]. For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined: for these cannot, through weakness, any more than the others through restraint, use their natural liberty and forsake him.

3. Qualified property, propter privilegium.

3. A man may, lastly, have a qualified property in animals *ferae naturae, propter privilegium:* that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty [z]; and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases. The manner in which this privilege is acquired, will be shewn in a subsequent chapter.

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Secondly, qualified property in other matters and things.

The qualified property which we have hitherto considered, extends only to animals *ferae naturae,* when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's antient windows [a], corrupts the

[x] Carta de forest. 9 Hen. III. c. 13. [y] 7 Rep. 17. Lamb. Eiren. 274.
[z] Cro. Car. 554. Mar. 48. 5 Mod. 376. 12 Mod. 144. [a] 9 Rep. 58.

air of his house or gardens[b], fouls his water[c], or unpens and lets it out, or if he diverts an antient water-course that used to run to the other's mill or meadow[d]; the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession: for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

Qualified property arising out of the circumstances of the possession.

These kinds of qualification in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. As in case of *bailment*, or delivery of goods to another person for a particular use; as to a carrier to convey to London, to an inn-keeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, mediately, his possession also[e]. So, also, in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, property in them: the pledgor's property is conditional, and depends upon the performance of the condition of repayment, &c.; and so too is that of the pledgee, which depends upon its non-performance[f]. The same may be said of goods distreined for rent, or other cause of distress[7]: which are in the nature of a pledge, and are not,

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[b] 9 Rep. 59. Lut. 92. [c] 9 Rep. 59. [d] 1 Leon. 273. Skin. 389. [e] 1 Roll. Abr. 607. [f] Cro. Jac. 245.

(7) Or taken in execution by the sheriff. (2 Moo. & Sc. 197; 6 Bligh, 277; 2 Saund. 47). So, the finder of a chattel has the right of possession against all the world, except the owner. (1 Str. 504; 1 Lead. Cas. 151).

at the first taking, the absolute property of either the distreinor, or party distreined upon; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. But a servant, who hath the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession, either absolute or qualified, but only a mere charge or oversight [g].

Property in action.

Having thus considered the several divisions of property in *possession*, which subsists there only, where a man hath both the right and also the occupation of the thing; we will proceed next to take a short view of the nature of property in *action*, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law: from whence the thing so recoverable is called
[397] a thing, or *chose, in action* [h]. Thus, money due on a bond is a *chose* in action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose* in action: for though a right to some recompense vests in me at the time of the damage done, yet what and how large such recompense shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases, the student will observe that the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum: and in the latter it depends upon an *implied* contract, that, if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts, either express or implied [8]; which are the only regular means

[g] 3 Inst. 108.

[h] The same idea, and the same denomination, of property prevailed in the civil law. "*Rem in bonis nostris habere intelligimur, quotiens ad recuperandum eam actionem habeamus.*" (Ff. 41. 1. 52.) And again, "*aeque bonis adnumerabitur etiam si quid est in actionibus, petitionibus, persecutionibus. Nam et haec in bonis esse videntur.*" (Ff. 50. 16. 49.)

(8) This is too limited, since a right to recover damages for a wrong is a chose in action which does not arise out of any contract.

of acquiring a *chose* in action, and of the nature of which we shall discourse at large in a subsequent chapter.

At present we have only to remark, that upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured, in case of non-performance; to compel the wrong-doer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a *chose* in action; being a thing rather in *potentia* than in *esse*: though the owner may have as absolute a property in, and be as well entitled to, such things in action, as to things in possession. [398]

Personal property considered as to time of enjoyment and number of owners.

And having thus distinguished the different *degree* or *quantity* of *dominion* or *property* to which things personal are subject, we may add a word or two concerning the *time* of their *enjoyment*, and the *number* of their *owners*; in conformity to the method before observed in treating of the property of things real.

1. Time of enjoyment.

First, as to the *time* of *enjoyment*. By the rules of the antient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were *generally* tolerated and allowed. But yet in last wills and testaments, such limitations of personal goods and chattels in remainder, after a bequest for life, were permitted[i]: though originally that indulgence was only shewn, when merely the use of the goods, and not the goods themselves, was given to the first legatee[k]; the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded[l]: and therefore, if a man, either by deed or will, limits his

[i] 1 Equ. Cas. Abr. 360. [k] Mar. 106. [l] 2 Freem. 206.

books or furniture to A. for life, with remainder over to B., this remainder is good [9]. But, where an estate tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation [m] [10]. For this, if allowed,

[m] 1 P. Wms. 290.

(9) 1 P. Wms. 652; 3 Meriv. 197.

(10) At this day chattels real and personal cannot be directly entailed, but they may by deed of trust be as effectually settled to one for life with remainders over, as an estate of inheritance, if it be not attempted to render them unalienable beyond the period allowed by law. (See Gilb. Uses, by Sugden, 121, n.(4)). Mr. Hargrave in Co. Lit. 20. a., n. (5), makes the following remarks:—"Two things seem essential to an entail within the Statute de Donis. One requisite is, that the *subject* be land, or some other thing of a *real* nature. The other requisite is, that the *estate* in it be an *inheritance*. Therefore, neither estates pur autre vie in lands, though limited to the grantee and his heirs during the life of cestui que vie, nor terms for years, are entailable any more than personal chattels; because, as the latter, not being either interest in things real or of inheritance, want both requisites, so the two former, though interests in things real, yet not being also of inheritance, are deficient in *one* requisite. However, estates pur autre vie, terms for years, and personal chattels may be so settled, as to answer the purposes of an entail, and be rendered unalienable almost for as long a time as if they were entailable in the strict sense of the word. Thus estates pur autre vie may be devised or limited in strict settlement by way of remainder like estates of inheritance, and such as have interest in the nature of estates-tail, may bar their issue and all remainders over by alienation of the estate pur autre vie, as those who are strictly speaking tenants in tail may do by fine and recovery; but then the having of issue is not an essential preliminary to the power of alienation in the case of an estate pur autre vie limited to one and the heirs of his body, as it is in the case of a conditional fee, from which the mode of barring by alienation was evidently borrowed. The manner of settling terms for years and personal chattels is different, for in them no remainders can be limited; but they may be entailed by *executory devise* or by *deed of trust*, as effectually as estates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being and twenty-one years after, and perhaps, in the case of a posthumous child, a few months more; a limitation of time not arbitrarily prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder as to postpone a complete bar of the entail by fine or recovery for a longer space. It is also proper to observe, that, in the case of terms of years and personal chattels, the *vesting* of an interest, which in realty would be an estate-tail, bars the issue, and all the subsequent limitations, as effectually as fine and recovery in the case of estates entailable, within the Statute *de Donis*, or a simple alienation in the case of conditional fees and estates *pur autre vie*; and further, that if the executory limitations of personalty are on contingencies too remote, the whole property is in the first taker: Upon the whole, by a series of decisions within the last two centuries, and after many struggles in respect to personalty, it is

would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail: and therefore the law vests in him at once the entire dominion of the goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate.

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Number of owners.

Next, as to the *number* of *owners*. Things personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in common, as well as real estates[5]. They cannot indeed be vested in co-parcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute co-parceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements[n]. And, in like manner, if the jointure be severed, as, by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship[o]. So, also, if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common[p]; as we have formerly seen[q], the same words would have done in regard to real estates. But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein[r 11].

[n] Litt. § 282. 1 Vern. 482. [o] Litt. § 321. [p] 1 Equ. Cas. Abr. 292.
[q] Page 193. [r] 1 Vern. 217. Co. Litt. 182.

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at length settled, that every species of property is in substance equally capable of being settled in the way of entail; and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the entail is circumscribed *almost* as nearly within the same limits as the difference of property will allow. As to the entail of estates pur autre vie, see 2 Vern. 184, 225; 1 P. Wms. 290, 652; 3 P. Wms. 262; 1 Atk. 524; 2 Atk. 259, 376; 3 Atk. 464; and 2 Ves. 681. As to the entail of terms for years and personal chattels, see 8 Co. 94; 10 Co. 46 b; Sir Wm. Jones, 15; 3 Cha. Cas. 1; Carth. 267; and 1 P. Wms. 1. See also Fearne, on Conting. Rem. 2nd ed. 122."

(11) As between partners in trade or farming, there is, generally speaking, no survivorship of personal property in *possession*, for each of their respective shares or degrees of interest goes to their personal representatives, who become

tenants in common with the survivor of all the partnership effects in possession, it being a maxim, inter mercatores jus accrescendi locum non habet. (Co. Lit. 3, 282, 182. a.; 1 Vern. 217; 1 Meriv. 564; 1 Ld. Raym. 281; Vin. Ab., *Partners*). But it has been determined that the good-will of a partnership survives; although that has been disputed. (5 Ves. 539; 15 Ves. 218; 1 Jac. & W. 267). A court of equity has barred survivorship, notwithstanding the deceased partner, upon being informed that by law there would be a survivorship, said he was content the stock should survive; (1 Vern. 217). But although there is no survivorship as to partnership property in possession, yet at law there is as to *choses in action*, for when one of two partners having a joint legal interest in a contract dies, an action against the other party must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined, neither can he sue separately, but must resort to a court of equity to obtain from the survivor the deceased's share of the sum which has been recovered. (1 East, 497; 2 Salk. 441; 1 Ld. Raym. 346; Carth. 170; Vin. Ab. *Partner*, D).—[CHITTY.] (See Cowp. 445; 1 Ves. sen. 242). As to the conversion in equity of real estate into partnership stock, see 3 P. Wms. 158; 1 Russ. & M. 45; 7 Sim. 271; 8 Id. 829; 11 Id. 496.

CHAPTER XXVI.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

WE are next to consider the *title* to things personal, or the various means of *acquiring*, and of *losing*, such property as may be had therein: both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally twelve: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift or grant. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration.

Titles to things personal.

The several modes of acquiring and losing the property therein.

And, first, a property in goods and chattels may be acquired by *occupancy*: which, we have more than once[a] remarked, was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments, legacies, and administrations, have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which has once been acquired by the owner. And, where such things are found without any other owner, they for the most part belong to the king by virtue of his prerogative; except in some few instances, wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

I. Title by occupancy.

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1. Thus, in the first place, it hath been said, that any body may seize to his own use such goods as belong to an

1. Goods of alien enemy.

[a] See pages, 3, 8, 258.

alien enemy [b]. For such enemies, not being looked upon as members of our society, are not entitled, during their state of enmity, to the benefit or protection of the laws; and, therefore, every man that has opportunity, is permitted to seize upon their chattels, without being compelled, as in other cases, to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must, in reason and justice, be restrained to such captors as are authorized by the public authority of the state, residing in the crown [c]; and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. And, therefore, it hath been holden [d], that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized [1]. It hath also been adjudged, that, if an enemy take the goods of an Englishman, which are afterwards re-taken by another subject of this kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker, unless they were re-taken the same day, and the owner before sun-set puts in his claim of property [e]. Which is agreeable to the law of nations, as understood in the time of Grotius [f], even with regard to captures made at sea; which were held to be the property of the captors after a possession of twenty-four hours; though the modern authorities [g] require, that, before the property can be changed,
[402] the goods must have been brought into port, and have continued a night *intra praesidia*, in a place of safe custody, so that all hope of recovering them was lost [2].

[b] Finch. L. 178.
[c] Ibid.
[d] Bro. Abr. tit. *Propertie*, 38; *Forfeiture*, 57.
[e] Freem. 40.
[f] De J. B. & P. l. 3, c. 6, § 3.
[g] Bynkersh. Quaest. Jur. Publ. I. 4. Rocc. De Assecur. Not. 66.

(1) And by modern decisions, the right to sue upon contracts made with him during peace is only suspended. not forfeited, by war. (13 Ves. 71; 3 B. & P. 191; 6 Taunt. 239; 7 Id. 439; 1 Chitty's Com. L. 423 to 426.)

(2) Modern authorities require something more to vest the property of a captured vessel in the captors. "I apprehend that, by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary; and that a neutral purchaser in Europe, during war, does look to the legal sentence of condemnation as one of the title-deeds of the ship, if he buys a prize vessel. I be-

And, as in the goods of an enemy, so also in his *person*, a man may acquire a sort of qualified property, by taking him a prisoner in war [h]; at least till his ransom be paid [i 3]. And this doctrine seems to have been extended to negro-

[h] Bro. Abr. tit. *Propertie*, 18.

[i] We meet with a curious writ of trespass in the register (102.) for breaking a man's house, and setting such his prisoner at large. "*Quare domum ipsius A. apud W. (in qua idem A. quendam H. Scotum per ipsum A. de guerra captum tanquam prisonem suum, quousque sibi de centum libris, per quas idem H. redemptionem suam cum praefato A. pro vitâ suâ salvandâ fecerat satisfactum foret, detinuit) fregit, et ipsum H. cepit et abduxit, vel quo voluit abire permisit, &c.*"

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lieve there is no instance in which a man, having purchased a prize vessel of a belligerent, has thought himself quite secure in making that purchase, merely because that ship had been in the enemy's possession twenty-four hours, or carried infra praesidia." (Sir Wm. Scott, 1 Rob. 139. See also 3 Rob. 97, and 236—8; 2 Burr. 683; 10 Mod. 79; 3 Esp. 286; 15 Ves. 139). But if, after the transfer of a prize to a neutral, a peace be concluded between the belligerents, the transfer becomes valid, even though there was no legal condemnation. (6 Rob. 142). The title of a neutral will not be defeated by his subsequently becoming an enemy. (6 Rob. 45; see 1 Chitty's Com. Law, 433—4). It has been established by several acts of Parliament, that, among English subjects, ships or goods taken at sea by an enemy, and afterwards retaken, at any indefinite period of time, and whether before or after sentence of condemnation, are to be restored to the original proprietors, on payment of certain salvage. (2 Burr. 1198; and 1 W. Bl. 27). The statute 43 Geo. 3, c. 160, s. 39, makes an exception as to ships which have been set forth by the enemy as vessels of war; enacting, that these shall not be restored to the original owners, but belong wholly to the recaptors. And if the property recaptured were captured first in an illegal trade, then the original right is divested, and the recaptors are not bound to restitution. (2 Rob. 77). In the case of *The Santa Cruz*, (1 Rob. 49), Sir Wm. Scott said, "The actual rule of the English maritime law I understand to be this, that the maritime law of England having adopted a most liberal rule of restitution with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle: in such a case it adopts their rule, and treats them according to their own measure of justice." But restitution in any case is not *gratuitous;* for by the 43 Geo. 3, c. 160, certain rates of salvage are secured to the recaptors, for saving or recovering the property. One-eighth of the beneficial interest in the whole recaptured property is given to king's ships, and one-sixth to private ships. And the reward of salvage is given in cases of rescue, when it is effected by the rising of the captured crew against the captors. (1 Rob. 271; 4 Id. 147; 1 Edw. 68).—[CHITTY.] (As to the jurisdiction of the Admiralty, see 2 & 3 Vict. c. 65, ss. 22, 23; 2 H. Bl. 533).

(3) Ransom of ships, &c., is now illegal, unless in case of necessity, to be allowed by the Admiralty, by 22 Geo. 3, c. 25; 43 Geo. 3, c. 160, ss. 34, 35, 36; 45 Geo. 3, c. 72; 2 Doug. 649; 3 Taunt. 6. Securities for ransom in the hands of innocent holders for value, are valid. (5 & 6 Will. 4, c. 41).

servants[j], who are purchased when captives, of the nations with whom they are at war, and are, therefore, supposed to continue, in some degree, the property of their masters who buy them: though, accurately speaking, that property (if it indeed continues), consists rather in the perpetual *service*, than in the *body* or *person* of the captive[k].

2. Goods found and owner unknown.

2. Thus again, whatever moveables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure; for these, we have formerly seen[l], are vested by law in the king, and form a part of the ordinary revenue of the crown.

3. Light, air, water, &c.

3. Thus, too, the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy. If I have an antient window, overlooking my neighbour's ground, he may not erect any blind to obstruct the light: but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him, than in me. If my neighbour makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but, if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbour's prior mill, or his meadow: for he hath by the first occupancy acquired a property in the current[4].

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4. Animals feræ naturæ.

4. With regard likewise to animals *ferae naturae*, all mankind had by the original grant of the Creator a right to pur-

[j] 2 Lev. 201. [k] Carth. 396. Ld. Raym. 147. Salk. 667. [l] Book I. ch. 8.

(4) The subject of this paragraph does not belong to the head of personal property. Rights to light, air, &c., are not of a personal nature, but are incidents to the enjoyment of real estate; and even easements annexed to the person, or in gross, are real property. (Vide, ante, p. 36, n. (46)).

sue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his *qualified* property, or, if dead, are *absolutely* his own: so that to steal them, or otherwise invade this property, is, according to their respective values, sometimes a criminal offence, sometimes only a civil injury. The restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aërial, or aquatic animals as go under the denomination of *game;* the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege[5]. But those animals, which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly: but the difference, at present made, arises merely from the positive municipal law.

5. To this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other *emblements*[6], by any *possessor* of the land who hath sown or planted it, whether he be owner of the inheritance, or of a less estate; which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels. They were devisable by testament before the statute of wills[m], and at the death of the owner shall vest in his executor and not his heir; they are forfeitable

5. Emblements.

[404]

[m] Perk. § 512.

(5) As to this, see page 419, note.

(6) The right to emblements does not seem to be aptly referred to the principle of occupancy; for they are the continuation of an inchoate, and not the acquisition of an original right. —[CHRISTIAN.] (Vide ante, p. 122.)

by outlawry in a personal action[n]: and by the statute 11 Geo. II. c. 19, though not by the common law[o], they may be distreined for rent arrere[7]. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given[p]; and it was extended to tenants in fee, principally for the benefit of their creditors: and, therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlawry, and distreinable for rent, they are not in other respects considered as personal chattels; and particularly they are not the object of larciny, before they are severed from the ground[q].

6. By accession.

6. The doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement[r]: but if the thing itself, by such operation, was changed into a different species, as, by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted[s 8]. And these doctrines are implicitly copied and

[n] Bro. Abr. tit. *Emblements*, 21. 5 Rep. 116.
[o] 1 Roll. Abr. 666.
[p] Page 122, 146.
[q] 3 Inst. 109.
[r] Inst. 2. 1. 25, 26, 31. Ff. 6. 1. 5.
[s] Inst. 2. 1. 25, 34.

(7) But by the 56 Geo. 3, c. 50, no sheriff or other officer shall sell or carry off from any lands any straw, chaff, turnips, or manure, in any case, nor any hay or other produce, contrary to any covenant or written agreement for the benefit of the owner of the land; but the tenant must give previous notice to the sheriff, &c. of the existence of such covenant, &c. The produce, &c. may be sold, subject to an agreement to expend it on the land. And landlords are not to distrain for rent on purchasers of crops severed from the soil, or other things sold subject to such agreement; nor shall the sheriff sell or dispose of any clover, rye-grass, or any artificial grass whatsoever, which shall be newly sown and be growing under any crop of standing corn. (See sections 6 & 7).

(8) This also has long been the law of England; for it is laid down in the

adopted by our Bracton [t], and have since been confirmed by many resolutions of the courts [u]. It hath even been held, that if one takes away and cloaths another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman [w].

7. Confusion an intermixture of goods.

7. But in the case of *confusion* of goods, where those of two persons are so intermixed, that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that, in both laws, the proprietors have an interest in common, in proportion to their respective shares [x]. But, if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost [y]. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent [z] [9].

8. Copyright in books.

8. There is still another species of property, which (if it subsists by the common law) being grounded on labour and invention, is more properly reducible to the head of occupancy than any other [10]; since the right of occupancy itself is supposed by Mr. Locke [a], and many others [b], to be founded on the personal labour of the occupant. And this is the

[t] L. 2, c. 2 & 3.
[u] Bro. Abr. tit. *Propertie*, 23. Moor. 20. Poph. 38.
[w] Moor. 214.
[x] Inst. 2. 1. 27, 28. 1 Vern. 217.
[y] Inst. 2. 1. 28.
[z] Poph. 38. 2 Bulstr. 325. 1 Hal. P. C. 513. 2 Vern. 516.
[a] On Gov. part 2, ch. 5.
[b] See page 8.

Year-books, that whatever alteration of form any property has undergone, the owner may seize it in its new shape, if he can prove the identity of the *original materials;* as, if leather be made into shoes, cloth into a coat, or if a tree be squared into timber, or silver melted or beat into a different figure. (5 Hen. 7, fo. 15; 12 Hen. 8, fo. 10).—[CHRISTIAN.]

(9) See 2 Camp. 576; 15 Ves. 442.

(10) The right to the exclusive use of particular *distinctive trade marks*, or of a particular partnership firm, (7

right, which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies. When a man, by the exertion of his rational powers, has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary
[406] the disposition he has made of it, appears to be an invasion of that right. Now the identity of a literary composition consists intirely in the *sentiment* and the *language;* the same conceptions, cloathed in the same words, must necessarily be the same composition: and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind, when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership; it being then a present to the public, like building a church or bridge, or laying out a new highway: but, in case the author sells a single book, or totally grants the copyright, it hath been supposed, in the one case, that the buyer hath no more right to multiply copies of that book for sale, than he hath to imitate for the like purpose the ticket which is bought for admission to an opera or a concert; and that, in the other, the whole property, with all its exclusive rights, is perpetually transferred to the grantee. On the other hand, it is urged, that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the author, *before* it is printed or published; yet, from the instant of publication, the exclusive right of an author or his assigns to the sole communication of his ideas immediately vanishes and evapo-

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Sim. 421), for enabling the public to know if it is dealing with, or buying the manufactures of, a particular person, is somewhat analogous to literary copyright, and, though partially founded on the notion of protecting the public from fraud, (3 Myl. & Cr. 338; 8 Sim. 477), is an example of a right much more evidently arising out of occupancy. (See 3 Dougl. 293; 3 B. & Cr. 541; 2 Ves. & B. 218; 2 Keen, 213; 3 Myl. & Cr. 1, 338; 5 Scott, N. R. 562.

rates; as being a right of too subtile and unsubstantial a nature to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate.

The Roman law adjudged, that, if one man wrote any thing on the paper or parchment of another, the writing should belong to the owner of the blank materials [c]: meaning thereby the mechanical operation of writing, for which [407] it directed the scribe to receive a satisfaction; for, in works of genius and invention, as in painting on another man's canvas, the same law [d] gave the canvas to the painter. As to any other property in the works of the understanding, the law is silent; though the sale of literary copies, for the purposes of recital or multiplication, is certainly as antient as the times of Terence [e], Martial [f], and Statius [g]. Neither with us in England hath there been (till very lately) any final [h] determination upon the right of authors at the common law.

But whatever inherent copyright might have been supposed to subsist by the common law, the statute 8 Ann. c. 19, (amended by statute 15 Geo. III. c. 53), hath now declared that the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, *and no longer* [i]; and hath also protected that property by additional penalties and forfeitures: directing farther, that if, at the end of that term, the author himself be living, the right shall then return to him for another term of the same duration [11]: and a similar privilege is extended to he

Copyright now exists by statute.

[c] *Si in chartis membranisve tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius sed tu dominus esse videris.* Inst. 2. 1. 33. See page 404.

[d] Ibid. § 34.

[e] Prol. in Eunuch. 20.

[f] Epigr. i. 67, iv. 72, xiii. 3, xiv. 194.

[g] Juv. vii. 83.

[h] Since this was first written, it was determined in the case of *Millar* v. *Taylor*, in B. R. Pasch. 9 Geo. III. 1769, that an exclusive and permanent copyright in authors subsisted by the common law. But afterwards, in the case of *Donaldson* v. *Becket*, before the House of Lords, 22 Febr. 1774, it was held that no copyright now subsists in authors, after the expiration of the several terms created by the statute of Queen Anne.

[i] By statute 15 Geo. III. c. 53, some additional privileges in this respect are granted to the universities, and certain other learned societies.

(11) For the history of the law of copyright, see Lowndes on Copyright, and *Millar* v. *Taylor*, 4 Burr. 2303. In that case (which arose out of the printing of Thomson's "Seasons"), it was decided, that the authors had, by

Prints and engravings.

inventors of prints and engravings, for the term of eight and twenty years, by the statutes 8 Geo. II. c. 13, and 7 Geo. III.

the common law, a perpetual copyright in their works; and that the statute of Anne, without interfering with this right, gave them additional remedies during a certain term. But this doctrine was overruled by the House of Lords, in the case of *Donaldson* v. *Becket*, (4 Burr. 2408), and it was held, that the statute of Anne had entirely taken away the common-law copyright.

The stats. 8 Ann, c. 19, 41 Geo. 3, c. 107, and 54 Geo. 3, c. 156, have been repealed by the 5 & 6 Vict. c. 45, which now regulates literary copyright; and which limits its duration to the period of forty-two years from the first publication, or the period of the life of the author and the seven years next following his death, whichever is the longest. If, after the death of the author, the proprietor of the copyright refuses to republish the work, the Judicial Committee of the Privy Council may, in its discretion, authorize another person to publish it.

A public register of the proprietorship of copyrights in printed works, and in MS. dramatic and musical pieces, is directed to be kept at the Hall of the Stationers' Company, a stamped and certified copy of any entry in which register is made primâ facie evidence of title. Entry in this register is not essential to the proprietor's title, but it is made a condition precedent to his right to sue upon an infringement; and assignments of copyright may be made by entry upon such register, in a prescribed form, without payment of any stamp duty.

The copyright of articles contributed to an encyclopædia, review, or other periodical work, is, in certain cases, to belong to the projector, publisher, or proprietor of such work; subject to the right of any contributor under any contract, express or implied, to publish his own contributions separately.

The infringement of copyright, by importing copies printed in foreign countries, is provided against by a clause in this act, and by the stat. 5 & 6 Vict. c. 47, ss. 23, 24, 25; see also 34 Geo. 3, c. 20. s. 37.

A copy of every book is directed to be delivered at the British Museum, within a month from the time of publication, and, after demand, copies are to be delivered to the Stationers' Company for the use of the Bodleian, Cambridge, Advocates', and Trinity College, Dublin, Libraries.

The universities of Cambridge and Oxford, and the colleges of Eton, Westminster, and Winchester, enjoy a perpetual unalienable copyright in such works as have been, or may be, given or bequeathed to them by the author or his representatives, such books not having been previously published or assigned. (Stat. 10 Geo. 3, c. 53; see Burr. 661, 2401; 1 Vern. 275; 2 Eden, 173; 6 Ves. 687; 9 Id. 341).

The stat. 1 & 2 Vict. c. 59, (the International Copyright Act), authorizes the Queen, by order in council, to grant a copyright in any book published abroad, to the author and his representatives and assigns. This act, which was intended to form the basis of mutual treaties between this country and foreign states, does not appear to have been put into operation. As to the copyright in works composed or published abroad, independently of this act, see 2 Sim. 237; 5 Id. 395; 10 Id. 329; 1 You. & C. 288; 4 Id. 485; 2 B. & Cr. 861; 9 Law J., N. S. Ch. 227.

The copyright of an unprinted and unpublished work may subsist, for any length of time, in the proprietor for the time being of the original manuscript. (Ambl. 694; 2 Eden, 329; 2 Meriv. 435; 4 Burr. 2330; 1 Chitt. 26; 2 Ves. & B. 23). It seems that the receiver of a letter, although he may keep the original, has no right to publish

c. 38, besides an action for damages, with double costs, by statute 17 Geo. III. c. 57 [12]. All which parliamentary pro-

copies, unless for the purpose of vindicating his character, &c. (2 Atk. 342; Ambl. 737; 2 Ves. & B. 19; 2 Swanst. 402; see 1 Ball & B. 207).

Although there can be no copyright in the bare plan, design, or idea of a work, and although works of mere compilation or calculation, such as road-books, directories, maps, mathematical tables, &c., or translations, must necessarily be very similar or identical in detail when they are constructed with the same design, yet the original compiler of any work of this kind is entitled to restrain other persons from making servile copies of his production. (1 East, 358; 16 Ves. & B. 77; see 1 Sim. & Stu. 4; 2 Beav. 6).

Upon the principle that no rights can originate in an act which is illegal or against public policy, it has been decided, with more of legal soundness than of good policy, that there is no copyright in a work which the court for the time being may consider to be detrimental to public morals or religion; so that assistance is refused even to the author himself wishing to suppress a work of this nature. (2 Meriv. 437; 2 Camp. 30; 5 B. & Cr. 173; Jac. 471). A work containing what a Chancellor may regard as "strange notions," has been considered to be obnoxious to the rule. (2 Meriv. 441).

Before the statute 3 & 4 Will. 4, c. 15, it was doubtful whether the author of a dramatic piece could restrain any person from representing it on the stage. (See 5 B. & Ad. 657; 5 T. R. 245; 1 Jac. & W. 481). The sole right of representation during the continuance of the copyright is, by that statute, given to the author and his licensees. (See 1 Ad. & El. 580; 5 Scott, 242; 8 Car. & P. 68, 78). The provisions of that act are extended by the stat. 5 & 6 Vict. c. 45, to musical compositions; and the exclusive right of representation subsists, under the latter act, during the whole of the enlarged period of copyright, which, in the case of unpublished pieces, commences with the date of the first representation. The assignment of the copyright of a dramatic piece or musical composition does not pass the right of representation, unless an intention to that effect is expressed.

The copyright in lectures, of the delivery of which two days' notice has been given to two neighbouring justices, is secured to the author by the stat. 5 & 6 Will. 4, c. 65.

(12) The principal differences in these three statutes concerning prints seem to be these: the 8 Geo. 2 gives an exclusive privilege of publishing to those who invent or design any print, for fourteen years only; the 7 Geo. 3 extends the term to twenty-eight years absolutely, to all who either invent the design, or make a print from another's design or picture; and those who copy such prints within that time, forfeit all their copies, to be destroyed, and five shillings for each copy; the 17 Geo. 3, gives the proprietor an action to recover damages and double costs for the injury he has sustained by the violation of his right.—[CHRISTIAN.] (See 9 Mee. & W. 622). The stat. 6 & 7 Will. 4, c. 59, extends the provisions of the 17 Geo. 3, c. 57, to Ireland.

By several statutes a copyright is created in designs for sculptures and various articles of manufacture, for periods varying according to the nature of the material, from nine months to fourteen years, the design being registered in a prescribed manner; and under the more recent of these acts, a limited protection in the nature of a patent right may be secured for various useful as well as ornamental inventions, free from some

Patents for inventions.

tections appear to have been suggested by the exception in the statute of monopolies, 21 Jac. I. c. 3, which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee [k] [13].

[k] 1 Vern. 62.

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of the difficulties and restrictions to which patents are subject. The statutes now in force are the 38 Geo. 3, c. 71; 54 Geo. 3, c. 56; 5 & 6 Vict. c. 100; and 6 & 7 Vict. c. 65.

(13) Long before the statute of James the illegality of monopolies had been insisted on, both in statutes and charters, but it was not until the reign of Elizabeth that the judges began in earnest to set themselves against royal grants of exclusive trading privileges. In the celebrated *Case of Monopolies* (11 Rep. 84 b, 44 Eliz.), they had the boldness to decide against a grant by the crown of the sole privilege of making cards within the realm. On this occasion it was said, that all monopoly patents were void, both at common law and by statute, unless they were granted to the introducer of a new trade or engine, and then for a reasonable time only, until the subjects might learn the invention.

The statute of James I. prohibited all monopolies, with some trifling exceptions in addition to the one important exception of "any letters patent and grants of privileges for the term of fourteen years or under, hereafter to be made, of the sole working or vending of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters patents and grants, shall not use; so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurting of trade, or generally inconvenient."

Letters patent for an invention are obtained upon petition to the Queen, which is referred to the attorney or solicitor-general, who, after hearing the applicant and any person who may present himself to oppose the grant, determines on the propriety of granting the patent, and reports accordingly. Separate letters patent are taken out for England, Scotland, and Ireland, but the colonies and channel islands may be included in an English patent.

By the letters patent the crown grants to the petitioner, his executors, administrators, and assigns, exclusive license to make, use, exercise, and vend his invention for the term of fourteen years, and prohibits other persons from using the invention without the patentee's license, under his hand and seal. The instrument contains a proviso, that the patent shall be void, if it shall appear that the grant is contrary to law, or prejudicial or inconvenient to the subjects, or that the invention is not new as to the public use thereof in England (or other limits within which the privilege is granted), or not invented or found out by the patentee (unless the patentee rests his title on a communication from abroad). A condition against assigning the patent to more than twelve persons follows, and then the important proviso, that the patent shall be void if the patentee do not particularly describe and ascertain the nature of his invention, and in what manner it is to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in Chancery within a certain time after the date of the letters patent.

The instrument referred to by this last proviso is called the *specification*, and it is required to be thus enrolled for public inspection, in order that any person may learn the mode of practising the invention, and may be enabled to practise it as soon as the term of monopoly expires. The inventor is required, as the price he pays for his monopoly, to enrol, to the best of his knowledge at the time, the fullest and most sufficient description of all the particulars on which the effect depends, so as to enable others to practise it as perfectly and with as little labour and expense as he himself can do. The specification must be sufficient to enable an ordinary workman, conversant with the manufacture, to perform it without making experiments, or exercising his invention. (Bull. N. P. 76; 2 Hen. Bl. 463). As any experiments made before the obtaining of the letters patent, with a view to perfecting the invention, might lead to its disclosure, and by that means to the loss of the protection of the letters patent, a period of four or six months, from the time of sealing the letters patent, is given, within which to enrol the specification, in order that the inventor may by trials mature his invention, and enable himself to describe the best mode of carrying it into effect. Although the specification contain a full disclosure of the invention, it will be bad if it claim (that is, state as part of the invention) anything which is not within the protection of the patent, that is to say, if it claim anything which is not new, or which is otherwise not a subject for a monopoly. "Unlearned men," said Lord Kenyon, in deciding against a specification of this kind, "look at the specification, and suppose every thing new that is there; if the whole be not new, it is hanging terrors over them." If, therefore, in describing the mode of exercising the invention, it be necessary to describe any machine or process already known, the inventor must take care to state, or to shew clearly, that he does not claim the use of such machine or process. Or, if the subject of the invention be an improvement on a principle already known, the specification will be bad, if it claim the application of the principle generally, instead of the particular variation in the mode of carrying it out, which is new. (2 Marsh. 211).

The hardships resulting from the strictness of the rules to which the title and specification of a patented invention are required to conform, have been alleviated by Lord Brougham's act of the 5 & 6 Will. 4, c. 83, which allows a patentee, with the permission of the attorney or solicitor-general, to enter for enrolment a *disclaimer* of any part either of the *title* or *specification* of his invention, or a memorandum of any alteration in such title or specification, not being such a disclaimer or alteration as would extend the privilege granted by the letters patent: such disclaimer or alteration to be advertised as the attorney or solicitor-general shall require. (See 2 Gale & D. 17, 2 Mee. & W. 471). The same statute authorizes the crown, on the report of the Judicial Committee of the Privy Council, to confirm a patent, when it shall appear that there was a prior invention or user of the subject, unknown to the patentee, but no public or general user: and upon a like report the crown is authorized to extend the term of any patent to a further period of not more than seven years. See also 2 & 3 Vict. c. 67; 7 Jur. 451, 459.

It has been said, that the specification is bad, if by it the patentee claim the exclusive use of anything which is not a fit subject-matter for a patent. The fitness of the subject is to be ascertained by reference to the exception in the statute against monopolies; from which we learn, that the patent, to be valid, must be for "the working or making of any manner of *new manu-*

factures, which *others*, at the time of making such letters patent and grant, *shall not use*;" and the grant must be to the "*true and first inventor* thereof," which words have been construed to mean either the discoverer of the thing by his own wit and experiments, or the first introducer of the thing *from abroad*, his finding it there being in some sense an invention. The patent then is bad, if, either by its title or by the specification, it applies to anything which is not a manufacture, that is, some machine, method, or process applied to practice, and producing some tangible result. As, for instance, if it claim the use of a principle or general law, without shewing how such principle is to be applied to practice so as to produce a useful result, or if it claim merely a new mode of using (*i. e.* in private life and not as part of a process of manufacture or trade) a thing already known. (See 2 H. Bl. 463; 8 T. R. 104; 8 Mee. & Welsb. 806). In a recent case (Webst. Pat. Cas. 144), Mr. Baron Alderson said, "You cannot take out a patent for a principle; you may take out a patent for a principle coupled with the mode of carrying the principle into effect, provided you have not only discovered the principle, but invented some mode of carrying it into effect. But then you must start with having invented some mode of carrying the principle into effect; if you have done that, you are entitled to protect yourself from all other modes of carrying the same principle into effect, that being treated by the jury as piracy of your original invention." (See 1 Car. & M. 471).

The invention must be new or substantially different from any known machine or process; but it is not easy to state any criteria by which to determine whether a particular invention is sufficiently novel to sustain a patent. The shearing of cloth from list to list by rotatory cutters; the use of shears from list to list, and of rotatory cutters from end to end, being previously known (3 Car. & P. 502);—the use of anthracite coal, in combination with a hot blast in smelting iron ore; the hot blast with other coal, and anthracite coal with the cold blast, being previously known (5 Scott, N. R. 338);—the making of iron tubes, by drawing a heated plate of iron, rolled up, through steel dies, *without* a mandril; the drawing of a heated plate of iron, rolled up, through grooved rollers, with a mandril, being previously known; so that the improvement (which was of great practical importance) consisted in a mere omission of part of a known process, (1 Cr. M. & R. 864; 1 Nev. & P. 602);—a new combination of known materials, (4 Scott, 337);—a new use of a known material in a known way, to produce a known result, (Webst. Pat. Cas. 100);—have all been held to be good subject-matter for patents; but in some cases the courts have not favoured slight improvements. (See Noy, 183; 3 B. & Ad. 881; Gods. Pat. 56; Webst. Pat. Cas. 207; 4 B. & Al. 547).

Novelty within the realm is sufficient; for it is indifferent whether the discovery is made by study or experiment, or by travel. (2 H. Bl. 491; 2 Salk. 447; 4 Car. & P. 55). But a patent for an invention, borrowed from another person who invented it within the realm, cannot be sustained; (Dav. Pat. Cas. 429; 1 Car. & P. 558); and, although distinct patents are granted for England, Holland, and Ireland, prior use in one of those countries will invalidate a patent granted for another of them. (8 Cl. & Fin. 437). And, although the statute of James speaks only of prior *use*, it seems that previous publication of a process in a book is sufficient to defeat a patent for it. (2 J. B. Moore, 434; 2 Mee. & W. 553; 9 Id. 302; see 2 W. Bl. 470). A prior public use of the invention, even by the inventor himself, will in-

validate his patent. (Holt, 58; Holroyd on Pat. 81; see 4 Car. & P. 55; 2 Mec. & W. 545; 9 Id. 300).

If a patent is granted for two distinct inventions, and one of them is not new or not useful, or if part of one entire process claimed by the specification is not new, the patent fails entirely. (5 B. & Al. 547; 2 J. B. Moore, 441; Webst. Pat. Cas. 202; 1 Nev. & P. 595; 2 Mec. & W. 544; 8 Cl. & Fin. 245).

As to the *utility* of the invention, (which is material at any rate, when it is described in the patent as an *improvement*), see Dav. Pat. Cas. 327, 333; 4 Moo. & Sc. 720; Webst. Pat. Cas. 54, 172; 2 Mec. & W. 544; 3 Car. & P. 543; 10 B. & Cr. 22; 2 B. & Ad. 370.

Letters patent for inventions always contain a proviso for rendering them void, if the letters patent, or the privileges thereby granted, become at any time vested in trust for more than twelve persons. (See 6 B. & Cr. 169; 10 B. & Cr. 826). It has been strangely held, that a grant of an *exclusive* license to use the invention throughout the whole district covered by the patent, is no breach of this condition. (5 Mec. & W. 675).

CHAP. XXVII.

OF TITLE BY PREROGATIVE AND FORFEITURE.

Title by prerogative in the king or his grantee.

A SECOND method of acquiring property in personal chattels is by the *king's prerogative:* whereby a right may accrue either to the crown itself, or to such as claim under the title of the crown; as by the king's grant, or by prescription, which supposes an antient grant.

Taxes and customs.

Such in the first place are all *tributes, taxes,* and *customs,* whether constitutionally inherent in the crown, as flowers of the prerogative and branches of the *census regalis,* or antient royal revenue, or whether they be occasionally created by authority of parliament; of both which species of revenue we treated largely in the former volume. In these the king acquires, and the subject loses, a property, the instant they become due: if paid, they are a *chose* in possession; if unpaid, a *chose* in action. Hither, also, may be referred all forfeitures, fines, and amercements due to the king, which accrue by virtue of his antient prerogative, or by particular modern statutes: which revenues created by statute do always assimilate, or take the same nature, with the antient revenues; and may therefore be looked upon as arising from a kind of artificial or secondary prerogative. And, in either case, the owner of the thing forfeited, and the person fined or amerced, lose and part with the property of the forfeiture, fine, or amercement, the instant the king or his grantee acquires it.

[409]

King cannot be joint owner in a chattel.

In these several methods of acquiring property by prerogative, there is also this peculiar quality, that the king cannot have a *joint* property with any person in one entire chattel, or such a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner as the king cannot, either by grant or contract, become a joint-tenant of a chattel real with another person [a], but by such

[a] See page 184.

grant or contract shall become entitled to the whole in severalty. Thus, if a horse be given to the king and a private person, the king shall have the sole property: if a bond be made to the king and a subject, the king shall have the whole penalty; the debt or duty being one single chattel[b]; and so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt[c]. For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but where they interfere, his is always preferred to that of another person[d]: from which two principles it is a necessary consequence, that the innocent, though unfortunate partner, must lose his share in both the debt and the horse, or in any other chattel in the same circumstances[1].

[b] Fitzh. Abr. tit. *Dette*, 38. Plowd. 243.

[c] Cro. Eliz. 263. Plowd. 323. Finch. Law. 178. 10 Mod. 245.

[d] Co. Litt. 30.

(1) But, in favour of commercial interests, it has been holden, that, on an extent, or extent in aid, against one of several partners, only the beneficial interest of that one can be taken. (1 Wightw. 50; Chitty, Prerog. Cr. 287). —[CHITTY.]

If a joint-tenant of any chattel interest commits suicide, the right to the whole chattel becomes vested in the king. This was decided after much solemn and subtle argument in 3 Eliz. The case is reported by Plowd. (262, Eng. ed.). Sir James Hales, a judge of the Common Pleas, and his wife, were joint-tenants of a term for years; Sir James drowned himself, and was found *felo de se;* and it was held that the term did not survive to the wife, but that Sir James's interest was forfeited to the king by the felony, and that it consequently drew the wife's interest along with it. The argument of Lord Chief Justice Dyer is remarkably curious: "The felony (says he) is attributed to the act; which act is always done by a living man, and in his lifetime, as my brother Brown said; for he said Sir James Hales was dead; and how came he to his death? It may be answered, by drowning; and who drowned him? Sir James Hales; and when did he drown him? in his lifetime. So that Sir James Hales being alive caused Sir James Hales to die; and the act of the living man was the death of the dead man. And then for this offence it is reasonable to punish the living man who committed the offence, and not the dead man. But how can he be said to be punished alive, when the punishment comes after his death? Sir, this can be done no other way but by divesting out of him, from the time of the act done in his lifetime, which was the cause of his death, the title and property of those things which he had in his lifetime."

This must have been a case of notoriety in the time of Shakespeare; and

King's property in treasure-trove, wrecks, waifs, royal fish, &c.

This doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned; as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment, either by deed or law, from any former proprietor. Such is the acquisition of property in wreck, in treasure-trove, in waifs, in estrays, in royal fish, in swans, [410] and the like; which are not *transferred* to the sovereign from any former owner, but are originally *inherent* in him by the rules of law, and are derived to particular subjects, as royal franchises, by his bounty. These are ascribed to him, partly upon the particular reasons mentioned in the eighth chapter of the former book; and partly upon the general principle of their being *bona vacantia*, and therefore vested in the king, as well to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth.

Prerogative copyright.

There is also a kind of prerogative *copyright* subsisting in certain books, which is held to be vested in the crown upon different reasons. Thus, 1. The king, as the executive magistrate, has the right of promulging to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all *acts of parliament, proclamations,* and *orders of council*[2]. 2. As supreme head of the church, he hath a right to the publication of all *liturgies,* and books of *divine service.* 3. He is also said to have a right, by purchase, to the copies of such *law-books, grammars,* and other compositions, as were compiled or translated at the expense of the crown. And upon these two last principles combined, the exclusive right of printing the translation of the *bible* is founded[3].

Property in game.

There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals

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it is not improbable that he intended to ridicule this legal logic by the reasoning of the grave-digger in Hamlet upon the drowning of Ophelia. (See Sir J. Hawkins' note in Stephens's edition). —[CHRISTIAN.]

(2) 1 W. Bl. 105; 2 Burr. 661. The Crown has no monopoly or right to grant a monopoly in almanacs. (2 W. Bl. 1004).

(3) 3 Bligh, N. S. 391.

ferae naturae, as are known by the denomination of *game*, with the right of pursuing, taking, and destroying them: which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. This may lead us into an inquiry concerning the original of these franchises, or royalties, on which we touched a little in a former chapter[f]; the right itself being an incorporeal hereditament, though [411] the fruits and profits of it are of a personal nature.

In the first place, then, we have already shewn, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *ferae naturae*, and therefore the property of nobody, but liable to be seized by the first occupant[4]. And so it was held by the imperial law, even so late as Justinian's time: "*ferae igitur bestiae, et volucres, et omnia animalia quae mari, "coelo, et terrâ nascuntur, simul atque ab aliquo capta fuerint, "jure gentium statim illius esse incipiunt. Quod enim nullius "est, id naturali ratione occupanti conceditur*[g]." But it follows, from the very end and constitution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws, enacted for reasons of state, or for the supposed benefit of the community. This restriction may be either with respect to the *place* in which this right may, or may not, be exercised; with respect to the *animals* that are the subject of this right; or with respect to the *persons* allowed or forbidden to exercise it. And, in consequence of this authority, we find that the municipal laws of many nations have exerted such power of restraint; have in general forbidden the entering on another man's grounds, for any cause, without the owner's leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he

[f] Pages 38, 39.

[g] Inst. 2. 1. 12.

(4) This could only exist when land was wholly unappropriated, for when the land was vested in the king or a subject, no other person could have a natural right to trespass thereon to kill animals feræ naturæ, or game.

shall authorize [h]. Many reasons have concurred for making these constitutions [5]: as, 1. For the encouragement of agriculture and improvement of lands, by giving every man an exclusive dominion over his own soil. 2. For preservation of the several species of these animals, which would soon be extirpated by a general liberty. 3. For prevention of idleness
[412] and dissipation in husbandmen, artificers, and others of lower rank; which would be the unavoidable consequence of universal licence. 4. For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people [i]; which last is a reason oftener meant, than avowed, by the makers of forest or game laws. Nor, certainly, in these prohibitions is there any *natural* injustice, as some have weakly enough supposed; since, as Puffendorf observes, the law does not hereby take from any man his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which, indeed, the law of nature would allow him, but of which the laws of society have, in most instances, very justly and reasonably deprived him.

Yet, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must, notwithstanding, acknowledge, that, in their present shape, they owe their immediate original to slavery. It is not till after the irruption of the northern nations into the Roman empire, that we read of any other prohibitions, than that natural one of not sporting on any private grounds without the owner's leave; and another of a more spiritual nature, which was rather a rule of ecclesiastical discipline, than a branch of municipal law. The Roman or civil law, though it knew no restriction as to *persons* or *animals*, so far regarded the article of *place*, that it allowed no man to hunt or sport upon another's ground, but by consent of the owner of the soil. "*Qui alienum fundum ingreditur, venandi aut*

[h] Puff. L. N. l. 4, c. 6, § 5. [i] Warburton's Alliance, 324.

(5) I am inclined to think that this reason did not operate upon the minds of those who framed the game laws of this country; for in several ancient statutes the avowed object is to encourage the use of the long-bow, the most effective armour then in use; and even since the modern practice of killing game with a gun has prevailed, every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game.—[CHRISTIAN.]

aucupandi gratia, potest a domino prohiberi ne ingrediatur [k]." For, if there can, by the law of nature, be any inchoate imperfect property supposed in wild animals before they are taken, it seems most reasonable to fix it in him upon whose land they are found. And as to the other restriction, which relates to *persons* and not to *place*, the pontifical or canon law [l] interdicts "*venationes, et sylvaticas vagationes cum canibus et accipitribus*," to all *clergymen* without distinction; grounded on a saying of St. Jerome [m], that it never is recorded that these diversions were used by the saints, or primitive fathers. And the canons of our Saxon church, published in the reign of king Edgar [n], concur in the same prohibition: though our secular laws, at least after the conquest, did, even in the times of popery, dispense with this canonical impediment; and spiritual persons were allowed by the common law to hunt for their recreation, in order to render them fitter for the performance of their duty: as a confirmation whereof, we may observe, that it is to this day a branch of the king's prerogative, at the death of every bishop, to have his kennel of hounds, or a composition in lieu thereof [o] [6]. [413]

But, with regard to the rise and original of our present civil prohibitions, it will be found that all forest and game laws were introduced into Europe at the same time, and by the same policy, as gave birth to the feodal system; when those swarms of barbarians issued from their northern hive, and laid the foundation of most of the present kingdoms of

[k] Inst. 2. 1. § 12.
[l] Decretal. l. 5, tit. 24, c. 2.
[m] Decret. part. 1, dist. 34, l. 1.
[n] Cap. 64. With. 86.
[o] 4 Inst. 309.

(6) When Archbishop Abbot by an unfortunate accident had killed a park-keeper in shooting at a deer with a cross-bow, though it was allowed no blame could be imputed to the archbishop but from the nature of the diversion, yet it was thought to bring such scandal upon the church, that an apology was published upon the occasion, which was warmly and learnedly answered by Sir Henry Spelman, who maintained that the archbishop was in the exercise of an act prohibited by the canons and ordinances of the church, and that he was even disqualified from exercising his spiritual functions. The king referred the consideration of the subject to the lord keeper and several of the judges and bishops, who recommended it to his majesty to grant his grace a dispensation *in majorem cautelam, si quâ forte sit irregularitas*; which was done accordingly. (See Reliquiæ Spelm. 107).—[CHRISTIAN.]

Europe on the ruins of the western empire. For, when a conquering general came to settle the oeconomy of a vanquished country, and to part it out among his soldiers or feudatories, who were to render him military service for such donations; it behoved him, in order to secure his new acquisitions, to keep the *rustici* or natives of the country, and all who were not his military tenants, in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting; and therefore it was the policy of the conqueror to reserve this right to himself, and such on whom he should bestow it; which were only his capital feudatories, or greater barons. And accordingly we find, in the feudal constitutions [p], one and the same law prohibiting the *rustici* in general from carrying arms, and also proscribing the use of nets, snares, or other engines for
[414] destroying the game. This exclusive privilege well suited the martial genius of the conquering troops, who delighted in a sport[q] which in its pursuit and slaughter bore some resemblance to war. *Vita omnis* (says Cæsar, speaking of the antient Germans) *in venationibus atque in studiis rei militaris consistit* [r]. And Tacitus in like manner observes, that *quoties bella non ineunt, multum venatibus, plus per otium transigunt* [s]. And indeed, like some of their modern successors, they had no other amusement to entertain their vacant hours; despising all arts as effeminate, and having no other learning than was couched in such rude ditties as were sung at the solemn carousals which succeeded these antient huntings. And it is remarkable that, in those nations where the feodal policy remains the most uncorrupted, the forest or game laws continue in their highest rigor. In France, all game is properly the king's [7]; and in some parts

[p] Feud. l. 2, tit. 27, § 5.

[q] In the laws of Jenghiz Khan, founder of the Mogul and Tartarian empire, published A. D. 1205, there is one which prohibits the killing of all game from March to October; that the court and soldiery might find plenty enough in the winter, during their recess from war. (Mod. Univ. Hist. iv. 468).

[r] De Bell. Gall. l. 6, c. 20.

[s] C. 15.

(7) Of course the game laws of France did not survive through the Revolution, of which they were one great exciting cause. The existing regulations on the subject very much resemble our own. (Code Penal, 28, 42).

of Germany it is death for a peasant to be found hunting in the woods of the nobility [t].

With us in England also, hunting has ever been esteemed a most princely diversion and exercise. The whole island was replenished with all sorts of game in the times of the Britons; who lived in a wild and pastoral manner, without inclosing or improving their grounds, and derived much of their subsistence from the chase, which they all enjoyed in common. But, when husbandry took place under the Saxon government, and lands began to be cultivated, improved, and enclosed, the beasts naturally fled into the woody and desart tracts; which were called the forests, and, having never been disposed of in the first distribution of lands, were therefore held to belong to the crown. These were filled with great plenty of game, which our royal sportsmen reserved for their own diversion, on pain of a pecuniary forfeiture for such as [415] interfered with their sovereign. But every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests: as is fully expressed in the laws of Canute [u], and of Edward the Confessor [v]: "*sit quilibet homo dignus venatione, sua in sylva, et in agris, sibi propriis, et in dominio suo: et abstineat omnis homo a venariis regiis, ubicunque pacem eis habere voluerit:*" which indeed was the antient law of the Scandinavian continent, from whence Canute probably derived it. "*Cuique enim in proprio fundo quamlibet feram quoquo modo venari permissum* [w]."

However, upon the Norman conquest, a new doctrine took place; and the right of pursuing and taking all beasts of chase or *venary*, and such other animals as were accounted *game*, was then held to belong to the king, or to such only as were authorized under him. And this, as well upon the principles of the feodal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee; and that therefore he has the right of the universal soil, to enter thereon, and to chase and take such creatures, at his pleasure; as also upon another maxim of the common law, which we have frequently cited and illustrated, that these

[t] Mattheus de Crimin. c. 3, tit. 1. Carpzov. Practic. Saxonic. p. 2, c. 84.
[u] C. 77. [v] C. 36. [w] Stiernhook de jure Sueon. l. 2, c. 8.

animals are *bona vacantia,* and, having no other owner, belong to the king by his prerogative. As, therefore, the former reason was held to vest in the king a *right* to pursue and take them any where; the latter was supposed to give the king, and such as he should authorize, a *sole* and *exclusive* right.

This right, thus newly vested in the crown, was exerted with the utmost rigor, at and after the time of the Norman establishment; not only in the antient forests, but in the
[416] new ones which the conqueror made by laying together vast tracts of country, depopulated for that purpose, and reserved solely for the king's royal diversion; in which were exercised the most horrid tyrannies and oppressions, under colour of forest law, for the sake of preserving the beasts of chase; to kill any of which, within the limits of the forest, was as penal as the death of a man. And, in pursuance of the same principle, king John laid a total interdict upon the *winged* as well as the *four-footed* creation: "*capturam avium per totam Angliam interdixit*[x]." The cruel and insupportable hardships, which these forest laws created to the subject, occasioned our ancestors to be as zealous for their reformation, as for the relaxation of the feodal rigors, and the other exactions introduced by the Norman family; and accordingly we find the immunities of *carta de forestâ* as warmly contended for, and extorted from the king with as much difficulty, as those of *magna carta* itself. By this charter, confirmed in Parliament[y], many forests were disafforested, or stripped of their oppressive privileges, and regulations were made in the regimen of such as remained; particularly[z] killing the king's deer was made no longer a capital offence, but only punished by a fine, imprisonment, or abjuration of the realm. And by a variety of subsequent statutes, together with the long acquiescence of the crown without exerting the forest laws, this prerogative is now become no longer a grievance to the subject.

But, as the king reserved to himself the *forests* for his own exclusive diversion, so he granted out from time to time other tracts of lands to his subjects, under the names of *chases* or *parks*[a], or gave them licence to make such in

[x] M. Paris, 303. [y] 9 Hen. III. [z] Cap. 10. [a] See page 38.

their own grounds; which indeed are smaller forests, in the hands of a subject, but not governed by the forest laws: and, by the common law, no person is at liberty to take or kill any beasts of chase, but such as hath an antient chase or park; unless they be also beasts of prey.

As to all inferior species of game, called beasts and fowls of warren, the liberty of taking or killing them is another franchise or royalty, derived likewise from the crown, and called *free warren;* a word, which signifies preservation or custody: as the exclusive liberty of taking and killing fish in a public stream or river is called a *free fishery;* of which however no new franchise can at present be granted by the express provision of *magna carta,* c. 16[b]. The principal intention of granting to any one these franchises or liberties was, in order to protect the game, by giving the grantee a sole and exclusive power of killing it himself, provided he prevented other persons. And no man, but he who has a chase or free warren, by grant from the crown, or prescription, which supposes one, can justify hunting or sporting upon another man's soil; nor indeed, in thorough strictness of common law, either hunting or sporting at all. [417]

Sole right of taking game originally in king.

However novel this doctrine may seem to such as call themselves *qualified* sportsmen, it is a regular consequence from what has been before delivered: that the sole right of taking and destroying game belongs exclusively to the king. This appears, as well from the historical deduction here made, as because he may grant to his subjects an exclusive right of taking them; which he could not do, unless such a right was first inherent in himself. And hence it will follow, that no person whatever, but he who has such derivative right from the crown, is by common law entitled to take or kill any beasts of chase, or other game whatsoever. It is true, that, by the acquiescence of the crown, the frequent grants of free warren in antient times, and the introduction of new penalties of late by certain statutes for preserving the game, this exclusive prerogative of the king is little known or considered; every man, that is exempted from these modern penalties, looking upon himself as at liberty to do what he pleases with the game: whereas the contrary is strictly true, that no man, however well *qualified*

[b] Mirr. c. 5, § 2. See page 40.

he may vulgarly be esteemed, has a right to encroach on the royal prerogative by the killing of game, unless he can shew a particular grant of free warren; or a prescription, which presumes a grant; or some authority under an act of Parliament. As for the latter, I recollect but two instances wherein an express permission to kill game was ever given by statute; the one by 1 Jac. I. cap. 27, altered by 7 Jac. I. cap. 11, and virtually repealed by 22 & 23 Car. II. c. 25, which gave authority, so long as they remained in force, to the owners of free warren, to lords of manors, and to all freeholders having 40*l. per annum* in lands of inheritance, or 80*l.* for life or lives, or 400*l.* personal estate, (and their servants), to take partridges and pheasants upon their own, or their master's, free warren, inheritance, or freehold[8]: the other by 5 Ann. c. 14, which empowers lords and ladies of manors to appoint gamekeepers to kill game for the use of such lord or lady: which, with some alteration, still subsists, and plainly supposes such power not to have been in them

Permission by statutes to kill game.

Qualification or excepting act, 22 & 23 Car. II. c. 25.

Gamekeepers.

(8) The Editor apprehends that what the learned Judge has here stated respecting the *first permission*, has arisen from a misconception of the subject. The first qualification act is the 13 Ric. 2, c. 13, the title of which is, "None shall hunt but they who have a sufficient living." The preamble states, that "divers artificers, labourers, servants, and grooms keep greyhounds and dogs, and on the holydays, when good christian people be at church hearing divine service, they go a hunting in parks, and warrens, and connigrees of lords and others, to the very great destruction of the same, and sometimes under such colour they make their assemblies, conferences, and conspiracies for to rise and disobey their allegiance; it is therefore ordained, that no artificer, labourer, or other layman, which hath not lands or tenements to the value of 40*s.* by the year, nor any priest to the value of 10*l.* shall keep any dogs, nets, nor engines to destroy deer, hares, nor conies, nor other *gentlemen's* game, upon pain of one year's imprisonment."

This statute clearly admits and restrains their former right: the 1 Jac. 1, c. 27, which seems intended for the encouragement of hawking, the most honourable mode of killing game at that time, begins with a general prohibition to all persons whatever to kill game with guns, bows, setting-dogs, and nets; but there is afterwards a proviso in the act, that it shall and may be lawful for persons of a certain description and estate to take pheasants and partridges upon their own lands, in the day-time, with nets. This proviso clearly refers to the preceding prohibition introduced by the statute, and by no means gives a *new permission* to the persons thus qualified, which they did not possess antecedently to that statute.

The Editor trusts that those who will take the trouble to examine the statute, will be convinced of the truth of this remark; and that the correction of this error alone will contribute in some degree to the refutation of the doctine which the learned Judge has advanced in this chapter and other parts of the

before[9]. The truth of the matter is, that these game laws (of which we shall have occasion to speak again in the fourth book of these commentaries) do indeed *qualify* nobody, except in the instance of a gamekeeper, to kill game: but only, to save the trouble and formal process of an action, by the person injured, who perhaps too might remit the offence, these statutes inflict *additional* penalties, to be recovered either in a regular or summary way, by any of the king's subjects, from certain persons of inferior rank who may be found offending in this particular. But it does not follow that persons, excused from these additional penalties, are therefore *authorized* to kill game. The circumstance of having 100*l. per annum*, and the rest, are not properly qualifications, but exemptions. And these persons, so exempted from the penalties of the game statutes, are not only liable to actions of trespass by the owners of the land; but also, if they kill game within the limits of any royal franchise, they are liable to the actions of such who may have the right of chase or free warren therein[10].

Commentaries, viz. that all the game in the kingdom is the property of the king or his grantees, being usually the lords of manors, p. 15, ante; game is royal property, 4 vol. 174; and the new constitutions vested the sole property of all the game in England in the king alone. (Ib. 415).—[CHRISTIAN.]

(9) The appointment and authority of gamekeepers is now regulated by the stat. 1 & 2 Will. 4, c. 32, which (sect. 13) authorizes any lord of a manor, lordship, or royalty, or reputed manor, &c., or the steward of the crown of any manor, &c., by writing under hand and seal (to be registered with the clerk of the peace), to appoint one or more persons as a gamekeeper to preserve or kill the game within the limits of such manor, &c., for the use of the lord or steward thereof; and to authorize such gamekeeper or gamekeepers, within those limits, to seize and take, for the use of such lord or steward, all such dogs, and nets, and other engines and instruments for the killing and taking of game, as shall be used there by any person not authorized to kill game *for want of a game certificate.*

By sect. 14, any lord of a manor, &c., is authorized to grant deputies to persons as gamekeepers to kill game for the use of themselves, or of any specified person or persons, who, if not killing game for the use of the persons appointing them, shall not be deemed to be, or entered or paid for, as such persons' gamekeepers or male servants.

Sect. 15 contains special regulations respecting appointments of gamekeepers in Wales. See Chitty's Burn's Just. tit. *Game.*

(10) The stat. 1 & 2 Will. 4, c. 32, has repealed the previous statutes relating to game (except the Night Poaching Act, 9 Geo. 4, c. 69), and has rendered a qualification to kill game no longer necessary. Every person, who has obtained an annual game certificate (upon which a duty of

Upon the whole it appears, that the king, by his prerogative, and such persons as have, under his authority, the royal franchises of chase, park, free warren, or free fishery, are the *only* persons who may acquire any property, however fugitive and transitory, in these animals *ferae naturae*, while living; which is said to be vested in them, as was observed in a former chapter, *propter privilegium*[11]. And it must also

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3*l.* 13*s.* 6*d.* is payable, 52 Geo. 3, c. 93; see 7 & 8 Geo. 4, c. 49; and 2 & 3 Vict. c. 35), is now entitled to kill game, subject to the law of trespass, and subject to a proviso as to certain leases made before the passing of the act, and subject to any existing or future contracts. The word "game" in that act is defined to have the same meaning which it had in the repealed stat. 5 Ann. c. 14, viz. to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards. But the act also contains provisions relative to other animals.

(11) The learned Judge has frequently, and even zealously, inculcated the position, that the common law has *vested the sole property of all the game in England in the king alone*, and of consequence that no man, let his rank and fortune be what they may, is qualified to kill game, or is exempt from the original penalties, unless he possesses some peculiar privilege derived from the king. This doctrine, enforced by so celebrated an author, apparently the result of mature deliberation, and which has been so long acquiesced in, the Editor should have questioned with diffidence, if he had not been fully persuaded that it was unsupported by any prior authority, and that the authorities to the contrary were numerous and irresistible.

The learned Judge himself admits, that this is a novel doctrine to such as call themselves qualified sportsmen; yet he has referred to no preceding authority whatever in any part of the Commentaries; but in p. 415, he has deduced this doctrine from two general principles. The first is, *that the king is the ultimate proprietor of all the lands in the kingdom, and therefore he has the right of the universal soil, to enter thereon, and to chase and take such creatures at his pleasure.* From the king's right to the universal soil, it is not evident why he should have a better right to take such creatures than to take any other production of that soil.

And even if the king should have a right to enter in person all the lands in the kingdom in pursuit of game, this affords no inference that the landowner may not enjoy this right concurrently with the king. But although no complaint can perhaps be made against the king for entering the lands of his subjects, it has been determined that this power cannot be given to his foresters and servants, in a case in Keilway, which in the sequel of this note I shall have occasion to take notice of.

The other general principle relied upon by the learned Commentator is, *another maxim of the common law, which he says he has frequently cited and illustrated, that these animals are* bona vacantia, *and, having no other owner, belong to the king by his prerogative.* It has been determined, that fish, if not confined, as in a trunk, cannot be called *bona et catalla;* and so game, till it is taken, is every where said to be *nullius in bonis.* But I am inclined to think that the very reverse of the maxim is true, and that *bona vacantia* belong to the first occupant or fortunate finder, except in those instances particularly specified by the

be remembered, that such persons as may thus lawfully hunt, fish, or fowl, *ratione privilegii*, have (as has been said)

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law, and in which they are expressly given to the king. (See 1 vol. 299, n.)

A person might have acquired by occupancy, even in the sixteenth century, an estate in real property. (See p. 258, ante). If a pearl should be found in an oyster, no lawyer, I think, would say, that it was the property of the king. If all wild animals had belonged to the crown, it would have been superfluous to have specified whales, sturgeons, and swans. Lord Coke tells us, that "a swan is a royal fowl; and all those the property whereof is not known do belong to the king by his prerogative: and so whales and sturgeons are royal fish, and belong to the king by his prerogative:" (*Case of swans*, 7 Co. 16). "And the king may grant wild swans unmarked." (Id. 18). But these are the only animals which our law has conferred this honour upon.

It is true that our kings, prior to the *carta de foresta*, claimed and exercised the prerogative of making forests wherever they pleased over the grounds of their subjects: within the limits of these forests certain wild animals were preserved by severe laws, for the recreation of the sovereign. A district thus bounded at the king's pleasure might have been granted by the king to any of his subjects who enjoyed the exclusive privilege either of a forest, chase, park, or free warren, according to the extent of the jurisdiction and powers conferred by the royal grant; (p. 38, ante, n. 54). But beyond the boundaries of these privileged places, neither the king nor any of his grantees claimed a property in the game: for, according to the law of king Canute, *quilibet homo dignus venatione, suâ in sylvâ, et in agris sibi propriis, et in dominio suo;* which law Manwood declares was confirmed by many succeeding kings. (Tit. For. pl. 3). If this were so, it cannot be correct, what the learned Commentator has advanced, that *upon the Norman conquest a new doctrine took place.* By the *carta de forestâ* all the new-made forests were disafforested and thrown open again; but besides the creation of new forests by the Norman kings, they had also made great encroachments and additions to the ancient Saxon forests; these encroachments were called *purlieus*, and as these were the same grievance to the owners of the land as the new forests, they also were disafforested, but with this distinction, that, as the grievance extended only to the land-owner, he was allowed to enjoy his lands in as full a manner as he had done before the encroachment; but they still continued with respect to the rest of the world under the forest-law jurisdiction. Hence it followed as a consequence, that the owner of a purlieu might hunt and kill game within the limits of the purlieu, as any other man might have done in his own grounds: and the authorities of Lord Coke and Manwood concur, if deer come out of the forest into the purlieu, the purlieu-man may hunt and kill them, provided he does it fairly and without *forestalling*. And this distinction is made; if a stag can recover the *filum forestæ*, the border of the forest, before the purlieu-man's dogs fasten upon him, he then belongs to the king or to the owner of the forest, and the purlieu-man must call his dogs back; but if they fasten upon him before he gains the forest, and he drags them into it, he belongs to the owner of the purlieu, who may enter the forest and carry him away. (4 Inst. 303; Manw. Purlieu). This alone is decisive, but there are various authorities to the same effect. In the Year-book, (12 Hen. 8, fo. 10), it is held, if a man drive a stag out of a forest and kill

only a qualified property in these animals: it not being absolute or permanent, but lasting only so long as the crea-

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him, he shall gain no property in him, because he shall derive no advantage from his own wrongful act; yet if the stag comes of himself beyond the limits of the forest, then any one (if qualified) may kill and take him, for they are animals *ferœ naturæ et nullius in bonis;* and the maxim, as the judges declared, was, *capiat qui capere potest*, i. e. catch that catch can.

That the king has no property in deer or other game when they are out of a forest, was determined also in a case reported by Keilway, 30, and copied by Manwood, 202. In that case an action of trespass was brought for entering the plaintiff's close; the defendant pleaded, that the place in which the trespass was supposed to be committed was adjoining to the king's forest, and that the plaintiff was bound to impale the said forest, and that for want of paling four deer escaped out of the forest into the plaintiff's land, and that he the defendant entered by the command of the forester to drive them back to the forest. The Court held that this plea was not good; "for though the plaintiff was in fault for not paling, yet it was not law for the forester, or any person, to drive the deer out of the ground, or to take them; and the reason was, *because the king had no property in them;* and this was different from the case of tame cattle, where the property still remains in the owner, though they are out of his ground, for which reason he may retake them wherever he finds them; but it is not so when the beasts are wild."

The learned Judge frequently intimates that no person is exempt from the original penalties; but I am inclined to think that no authority whatever can be found, that any penalties were ever inflicted for killing game out of privileged grounds, except those which have been introduced by modern game laws, or the qualification acts. Lord Coke reports that the Court held in the case of monopolies (11 Co. 87), that "it is true that none can make a park, chase, or warren, without the king's license, for that is *quodam modo* to appropriate those creatures, which are *ferœ naturæ et nullius in bonis*, to himself, and to restrain them of their natural liberty, which he cannot do without the king's license; but for hunting, hawking, &c., which are matters of pastime, pleasure, and recreation, there needs no license, but every one may in his own land use them at his pleasure, *without any restraint to be made unless by Parliament*, as appears by the statutes of 11 Hen. 7, c. 17, 23 Eliz. c. 10, and 3 Jac. 1, c. 13.

These authorities are also recognised and confirmed in Bro. Abr. tit. *Propertie*, and in Hale's commentary on F. N. B. 197.

The following may serve as a specimen of the authorities collected by Brooke:—*quant beastes savages le roye aler hors del forrest, le property est hors del roy;* and again, *silz sount hors del parke capienti conceditur.*

In a great case, which was brought in 1791, from the courts of Scotland before the House of Lords, the question was, whether by the law of Scotland the proprietor of an estate has a right to monopolize the game upon that estate, for the use of himself, and particular friends authorized by his license, and to exclude all gentlemen legally qualified from following that amusement over his waste and other grounds, not specially protected by any particular statute? The printed cases of the appellant and respondent contain much curious learning upon the Scotch game laws; but no idea was suggested that the game in Scotland belonged to the king. For the appel-

tures remain within the limits of such respective franchise or liberty, and ceasing the instant they voluntarily pass out of it. It is held, indeed, that if a man starts any game within his own grounds, and follows it into another's, and kills it there, the property remains in himself[c]. And this is grounded on reason and natural justice[d]: for the property consists in the possession; which possession commences by the finding it in his own liberty, and is continued by the immediate pursuit. And so, if a stranger starts game in one man's chase or free warren, and hunts it into another liberty, the property continues in the owner of the chase or warren; this property arising from privilege[e], and not being changed by the act of a mere stranger. Or if a man starts game on another's private grounds, and kills it there, the property belongs to him in whose ground it was killed, because it was also started there[f]; this property arising *ratione soli*. Whereas, if, after being started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local; nor yet to the owner of the second, because it was not started in his soil; but it vests in the person who started and killed it[g], though guilty of a trespass against both the owners[12].

[c] 11 Mod. 75.
[d] Puff. L. N. l. 4, c. 6.
[e] Lord Raym. 251. [2 Salk. 555. 3 Salk. 290. Comb. 458; and see 14 East, 249.]
[f] Lord Raym. 251.
[g] Farr. 18. Lord Raym. 251.

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lant, who insisted that he had a right to enter as a sportsman upon the respondent's estate, the authority of President Balfour in his Practics was chiefly relied upon; viz. "It is leisome and permitted to all men to chaise hares, foxes, and all other beistis, beand without forrestis, warrenis, parkis, or wardis." But the judgment of the Lords being for the respondent, this permission of courts must be confined to a man's own estate. *Livingstone* v. *Lord Breadalbane*. This is precisely the same as the law of England; for neither a lord of a manor, nor his gamekeeper, can go into any part of the manor, which is not the lord's own estate or waste, without being a trespasser like any other person.—[CHRISTIAN.]

(12) These distinctions never could have existed, if the doctrine had been true, that all the game was the property of the king, for in that case the maxim, *in æquali jure potior est conditio possidentis*, must have prevailed.

These distinctions I have heard recognised by Lord Kenyon, who, in an action of trover, directed a verdict for the plaintiff; the defendant having carried away a hare, killed by the plaintiff's greyhounds upon the defendant's ground, but which had not been started there.—[CHRISTIAN.]

III. Forfeiture.

III. I proceed now to a third method, whereby a title to goods and chattels may be acquired and lost, *viz.* by *forfeiture*; as a punishment for some crime or misdemeanor in the party forfeiting, and as a compensation for the offence and injury committed against him to whom they are forfeited. Of forfeitures, considered as the means whereby *real* property might be lost and acquired, we treated in a former chapter [h]. It remains, therefore, in this place only to mention by what means, or for what offences, goods and chattels become liable to forfeiture.

In the variety of penal laws with which the subject is at present encumbered, it were a tedious and impracticable task to reckon up the various forfeitures inflicted by special statutes for particular crimes and misdemesnors: some of which are *mala in se*, or offences against the divine law, either natural or revealed; but by far the greatest part are *mala prohibita*, or such as derive their guilt merely from their prohibition by the laws of the land: such as is the forfeiture of 40*s. per* month by the statute 5 Eliz. c. 4, for exercising a trade without having served seven years as an apprentice thereto [13]; and the forfeiture of 10*l.* by 9 Ann. c. 23 [14], for printing an almanack without a stamp. I shall, therefore, confine myself to those offences only, by which *all* the goods and chattels of the offender are forfeited: referring the student for such, where pecuniary mulcts of different quantities are inflicted, to their several proper heads, under which very many of them have been or will be mentioned; or else to the collections of Hawkins, and Burn, and other laborious compilers. Indeed, as most of these forfeitures belong to the crown, they may seem as if they ought to have been referred to the preceding method of acquiring personal property, namely, by prerogative. But as, in the instance of partial forfeitures, a moiety often goes to the informer, the poor, or sometimes to other persons; and as one total for-

[h] See page 267.

(13) This forfeiture is abolished. (54 Geo. 3, c. 96. Vol. 1, p. 426).

(14) This forfeiture was abolished by the stat. 30 Geo. 2, c. 19, s. 26, which subjected all persons uttering or exposing to sale unstamped almanacks to three months' imprisonment. But the stamp duty on almanacks was repealed by the statute, 4 & 5 Will. 4, c. 57.

feiture, namely, that by a bankrupt who is guilty of felony by concealing his effects, accrues entirely to his creditors, I have therefore made it a distinct head of transferring property. [421]

Goods forfeited by conviction of offences.

Goods and chattels[15] then are totally forfeited by conviction of *high treason* or *misprision* of treason; of *petit treason*[16]; of *felony* in general, and particular of *felony de se*, and of *manslaughter*; nay, even by conviction of *excusable homicide*[1]; by *outlawry* for treason or felony; by conviction of *petit larciny*[17]; by *flight* in treason or felony, even though the party be acquitted of the fact[18]; by *standing mute*, when arraigned of *felony*; by *drawing a weapon on a judge*, or *striking* any one *in the presence of the king's courts*; by *praemunire*; by *pretended prophecies*, upon a second conviction; by *owling*; by the *residing abroad* of artificers[19]; and by *challenging to fight* on account of money won at gaming. All these offences, as will more fully appear in the fourth book of these commentaries, induce a total forfeiture of goods and chattels.

When forfeiture commences.

And this forfeiture commences from the time of *conviction*, not the time of committing the fact, as in forfeitures of real property. For chattels are of so vague and fluctuating a nature, that to affect them by any relation back, would be attended with more inconvenience than in the case of landed

[1] Co. Litt. 391. 2 Inst. 316. 3 Inst. 320.

(15) This forfeiture extends to all the offender's personal property, including chattels real, whether legal or equitable, in possession or in action; (Cro. Jac. 513; 2 B. & Al. 258; 2 C., M. & R. 416); with the exception of contingent interests. (1 Keen, 145).

The goods vest in the crown immediately upon conviction, and, as a felon who has been transported is not restored to his civil rights until he is pardoned, or the term expires, all personal property accruing to him in the interval is forfeited to the crown. (2 B. & Al. 258; 1 Myl. & K. 752).

(16) The crime of petit treason is now unknown to the law. (9 G. 4, c. 31, s. 2).

(17) The distinction between grand and petit larceny is abolished. (7 & 8 Geo. 4, c. 29, s. 2).

(18) By the stat. 7 & 8 Geo. 4, c. 28, s. 5, on indictments for felony, the jury is no longer to be charged to inquire concerning the prisoner's land or goods, or whether he fled for the offence.

(19) Owling is no longer an offence. (5 Geo. 4, c. 47). By the 5 Geo. 4, c. 97, all the laws relating to artificers or colliers going into foreign parts are repealed. See vol. 4, p. 154, 160.

estates: and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz. c. 5 [20].

(20) A bonâ fide sale of goods and chattels by the offender, for good consideration, after the offence and before conviction, is good. (8 Rep. 171; 2 Curw. Hawk. P. C. 645. See Skinn. 357; 1 Stark. 319; 6 Car. & P. 145).

CHAPTER XXVIII.

OF TITLE BY CUSTOM.

A FOURTH method of acquiring property in things personal, or chattels, is by *custom:* whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. It were endless, should I attempt to enumerate all the several kinds of special customs which may entitle a man to a chattel interest in different parts of the kingdom: I shall therefore content myself with making some observations on three sorts of customary interests, which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern; viz. *heriots, mortuaries,* and *heir-looms.* IV. Title by custom.

1. Heriots, which were slightly touched upon in a former chapter [a], are usually divided into two sorts: heriot-*service,* and heriot-*custom.* The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent [b]: the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom [c]. Of these therefore we are here principally to speak: and they are defined to be a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land. 1. Heriots.

The first establishment, if not introduction, of compulsory heriots into England, was by the Danes; and we find in the laws of king Canute [d] the several *heregeates* or heriots specified, which were then exacted by the king on the death of divers of his subjects, according to their respective dignities; from the highest *eorle* down to the most inferior *thegne* or landholder. These, for the most part, consisted in arms, [423] Heriots are of Danish origin.

[a] Page 97. [b] 2 Saund. 166. [c] Co. Cop. § 24. [d] C. 69.

horses, and habiliments of war; which the word itself, according to Sir Henry Spelman[e], signifies. These were delivered up to the sovereign on the death of the vasal, who could no longer use them, to be put into other hands for the service and defence of the country. And upon the plan of this Danish establishment did William the conqueror fashion his law of reliefs, as was formerly observed[f]; when he ascertained the precise relief to be taken of every tenant in chivalry, and, contrary to the feodal custom and the usage of his own duchy of Normandy, required arms and implements of war to be paid instead of money[g].

Reliefs.

The Danish compulsive heriots being thus transmuted into reliefs, underwent the same several vicissitudes as the feodal tenures, and in socage estates do frequently remain to this day in the shape of a double rent, payable at the death of the tenant; the heriots which now continue among us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary[h]. These are now, for the most part, confined to copyhold tenures, and are due by custom only, which is the life of all estates by copy; and perhaps are the only instance where custom has favoured the lord. For this payment was originally a voluntary donation, or gratuitous legacy of the tenant; perhaps, in acknowledgment of his having been raised a degree above villenage, when all his goods and chattels were quite at the mercy of the lord; and custom, which has on the one hand confirmed the tenant's interest in exclusion of the lord's will, has on the other hand established this discretional piece of gratitude into a permanent duty. An heriot may also appertain to free land, that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, whereupon the heriot is still due by custom. Bracton[i] speaks of heriots as frequently due on the death of both species of tenants: "*est quidem alia praestatio quae nominatur heriettum; ubi tenens, liber vel servus, in morte sud dominum suum, de quo tenuerit, respicit de meliori averio suo, vel de secundo meliori, secundum diversam locorum consuetudinem.*" And this he adds, "*magis fit de gratiâ quam de jure;*" in

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[e] Of Feuds, c. 18.
[f] Page 65.
[g] LL. Guil. Conq. c. 22, 23, 24.
[h] Lambard. Peramb. of Kent, 492.
[i] L. 2, c. 36, § 9.

which Fleta[k] and Britton[l] agree: thereby plainly intimating the original of this custom to have been merely voluntary, as a legacy from the tenant; though now the immemorial usage has established it as of right in the lord.

This heriot is sometimes the best live beast or *averium*, which the tenant dies possessed of (which is particularly denominated the villein's relief, in the twenty-ninth law of king William the conqueror), sometimes the best inanimate good, under which a jewel or piece of plate may be included: but it is always a *personal* chattel, which, immediately on the death of the tenant, who was the owner of it, being ascertained by the option of the lord[m], becomes vested in him as his property[1]; and is no charge upon the lands, but merely on the goods and chattels. The tenant must be the owner of it, else it cannot be due; and therefore on the death of a feme-covert no heriot can be taken: for she can have no ownership in things personal[n]. In some places, there is a customary composition in money, as ten or twenty shillings in lieu of a heriot, by which the lord and tenant are both bound, if it be an indisputably antient custom; but a new composition of this sort will not bind the representatives of either party; for that amounts to the creation of a new custom, which is now impossible[o 2].

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2. Mortuaries are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister in very many parishes on the death of his parishioners[3]. They seem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended, as Lyndewode informs us, from a constitution of Archbishop Langham, as a kind of expiation and amends to the clergy for the personal tithes, and other ecclesiastical duties, which the laity in

2 Mortuaries.

[k] L. 3, c. 18. [l] C. 69. [m] Hob. 60.
[n] Keilw. 84. 4 Leon. 239. [o] Co. Cop. § 31.

(1) See 1 Gale & D. 230.

(2) 1 Bos. & P. 282; 5 Scott, 453. Upon the division of a copyhold among several owners, it becomes liable for several heriots in respect of each owner; a liability which ceases on the re-union of the title in one person. (9 Moo. 502; 6 B. & Cr. 2).

(3) See Burn, Ecc. L. tit. *Mortuaries*.

their life-time might have neglected or forgotten to pay. For this purpose, *after*[p] the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary: "*si decedens plura habuerit animalia, optimo cui de jure fuerit debitum reservato, ecclesiae suae sine dolo, fraude, seu contradictione quâlibet, pro recompensatione subtractionis decimarum personalium, necnon et oblationum, secundum melius animal reservetur, post obitum, pro salute animae suae*[q]." And, therefore, in the laws of king Canute[r], this mortuary is called soul-scot (ſaþlſceat) or *symbolum animae*. And, in pursuance of the same principle, by the laws of Venice, where no personal tithes have been paid during the life of the party, they are paid at his death out of his merchandize, jewels, and other moveables[s]. So, also, by a similar policy, in France, every man that died without bequeathing a part of his estate to the church, which was called *dying without confession*, was formerly deprived of christian burial: or, if he died intestate, the relations of the deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church, in case he had made a will. But the parliament, in 1409, redressed this grievance[t].

It was antiently usual in this kingdom to bring the mortuary to church along with the corpse when it came to be buried; and thence[u] it is sometimes called a *corse-present*:
[426] a term which bespeaks it to have been once a voluntary donation. However, in Bracton's time, so early as Henry III. we find it rivetted into an established custom: insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. "*Imprimis autem debet quilibet, qui testamentum fecerit, dominum suum de meliori re quam habuerit recognoscere; et postea ecclesiam de aliâ meliori:*" the lord must have the best good left him as an heriot; and the church the second best as a mortuary. But yet this custom was different in different places: "*in quibusdam locis habet ecclesia melius animal de consuetudine; in quibusdam secundum, vel tertium melius; et*

[p] Co. Litt. 185.
[q] Provinc. l. 1, tit. 3.
[r] C. 13.
[s] Panormitan. ad Decretal. l. 3, t. 20, c. 32.
[t] Sp. L. b. 28, c. 41.
[u] Selden, Hist. of Tithes, c. 10.

in quibusdam nihil: et ideo consideranda est consuetudo loci[w]." This custom still varies in different places, not only as the mortuary to be paid, but the person to whom it is payable. In Wales a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese; till abolished, upon a recompense given to the bishop, by the statute 12 Ann. st. 2, c. 6. And in the archdeaconry of Chester, a custom also prevailed, that the bishop, who is also archdeacon, should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring[x]. But by statute 28 Geo. II. c. 6, this mortuary is directed to cease, and the act has settled upon the bishop an equivalent in its room. The king's claim to many goods, on the death of all prelates in England, seems to be of the same nature; though Sir Edward Coke[y] apprehends, that this is *a duty due upon death* and not a *mortuary:* a distinction which seems to be without a difference. For not only the king's ecclesiastical character, as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowledged mortuary, puts the matter out of dispute. The king, according to the record vouched by Sir Edward Coke, is entitled to six things: the bishop's best horse or palfrey, with his furniture; his cloak, or gown, and tippet; his cup, and cover; his bason and ewer; his gold ring; and lastly, his *muta canum*, his mew or kennel of hounds; as was mentioned in the preceding chapter[z].

Mortuary on death of clergyman.

Mortuary on death of a prelate.

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This variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other; it was thought proper, by statute 21 Hen. VIII. c. 6, to reduce them to some kind of certainty. For this purpose, it is enacted, that all mortuaries, or corse-presents to parsons of any parish, shall be taken in the following manner; unless where by custom less or none at all is due: viz. for every person who does not leave goods to the value of ten marks, nothing: for

Stat. 21 Hen. 8, c. 6.

[w] Bracton, l. 2, c. 26. Flet. l. 2, c. 57.

[x] Cro. Car. 237.

[y] 2 Inst. 491.

[z] Page 413.

every person who leaves goods to the value of ten marks, and under thirty pounds, 3*s.* 4*d.*; if above thirty pounds, and under forty pounds, 6*s.* 8*d.*; if above forty pounds, of what value soever they may be, 10*s.* and no more. And no mortuary shall, throughout the kingdom, be paid for the death of any feme-covert; nor for any child; nor for any one of full age that is not a housekeeper; nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day.

3. Heir-looms.

3. Heir-looms are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. The termination, *loom*, is of Saxon original; in which language it signifies a limb or member[a]; so that an heir-loom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold: otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor[b] [4]. But deer in a real authorized
[428] park, fishes in a pond, doves in a dove-house, &c., though in themselves personal chattels, yet they are so annexed to, and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase[c]. For this reason also I apprehend it is, that the antient jewels of the crown are held to be heir-looms[d]; for they are necessary to maintain the state, and

[a] Spelm. Gloss. 277.
[b] Co. Litt. 388.
[c] Ibid. 8.
[d] Ibid. 18.

(4) Or if any chattel be given to a man and the heirs of his body, he takes the entire and absolute interest in it. There have been many fruitless attempts to make pictures, plate, books, and household furniture, descend to the heir with a family mansion. Where they are left to be enjoyed as heir-looms by the persons who shall respectively be in possession of a certain house, or to descend as heir-looms as far as courts of law and equity will admit, the absolute interest of them, subject to the life-interests of those who have life-estates in the real property, will vest in that person who is entitled to the first estate-tail or estate of inheritance, and, upon his death, that interest will pass to his personal representative. (1 Bro. 274; 3 Bro. 101).—[CHRISTIAN.] (But see 1 Swanst. 537; Jac. 108; and ante, p. 174, n; 398, n.).

support the dignity, of the sovereign for the time being. Charters, likewise, and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained[5], shall pass together with the land to the heir[6], in the nature of heir-looms, and shall not go to the executor[e][7]. By special custom, also, in some places, carriages, utensils, and other household implements, may be heir-looms[f]; but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, "*quod ab aedibus non facile revellitur*[g]," is become a member of the inheritance, and shall thereupon pass to the heir; as chimney-pieces, pumps, old fixed or dormant tables, benches, and the like[h]. A very similar notion to which prevails in the duchy of Brabant, where they rank certain things moveable among those of the immoveable kind, calling them by a very particular appellation, *praedia volantia*, or volatile estates: such as beds, tables, and other heavy implements of furniture, which (as an author of their own observes), "*dignitatem istam nacta sunt, ut villis, sylvis, et aedibus, aliisque praediis, comparentur; quod solidiora mobilia ipsis aedibus ex destinatione patrisfamilias cohaerere videantur, et pro parte ipsarum aedium aestimentur*[i]."

Charters, title-deeds, court-rolls.

Other personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or

Monuments, &c.

[e] Bro. Abr. tit. *Chatteles*, 18.
[f] Co. Litt. 18, 185.
[g] Spelm. Gloss. 277.
[h] 12 Mod. 520.
[i] Stockman's de jure devolutionis, c. 3, § 16.

(5) But, according to the old authorities, the chest goes to the executor, if it be not sealed up. (Plowd. 323; Bro. Ab., *Chatteles*, 18). Sed quære.

(6) In general, the right to the custody of title-deeds descends or passes with the estate to the *existing* present owner of the freehold, whether tenant for life or in fee, and he may retain or recover the deeds from any other person (4 T. R. 229).

(7) But these come rather under the description of fixtures, or things fixed to and forming part of the freehold at common law, than of heir-looms by custom, which are generally understood to be moveable chattels, for which an action of trover may be brought. (4 Scott, 402. See ante, pp. 17, 281). In *Lord Petre* v. *Heneage*, (1 Ld. Raym. 728), it is said, that "a jewel cannot be an heir-loom, but only things ponderous, as carts, tables, &c."

tombstone, in a church [8], or the coat-armor of his ancestor
[429] there hung up, with the pennons and other ensigns of honor, suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from
Pews. the heir [k]. Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir [l 9]. But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it: and, if any one, in taking up a dead body, steals the shroud or other apparel, it will be felony [m]; for the property thereof remains in the executor, or whoever was at the charge of the funeral [10].

[k] 12 Rep. 105. Co. Litt. 18.
[l] 3 Inst. 202. 12 Rep. 105.
[m] 3 Inst. 110. 12 Rep. 113. 1 Hal. P. C. 515.

(8) See *Spooner* v. *Brewster*, 3 Bingh. 136; 10 Moore, 494.

(9) The right to sit in a particular pew in a church arises either from prescription as appurtenant to a messuage, or from a faculty or grant from the ordinary, for he has the disposition of all pews which are not claimed by prescription. (Gibs. Cod. 221).—[CHRISTIAN.] (See generally as to the right to pews, 1 Phillim. 316).

In an action upon the case at law for a disturbance of the enjoyment of a pew in the body of the church, if the plaintiff claims it by prescription, he must state it in the declaration as appurtenant to a messuage in the parish. (5 B. & B. 356). But a pew in the aisle or chancel of the church may be prescribed for in respect of a house out of the parish. (Forrest, Rep. 14; 5 B. & A. 361, S. P.). This prescription may be supported by an enjoyment for thirty-six years, and perhaps any time above twenty years. (1 T. R. 428). But where a pew was claimed as appurtenant to an ancient messuage, and it was proved that it had been so annexed for thirty years, but that it had no existence before that time, it was held that this modern commencement defeated the prescriptive claim. (5 T. R. 296). In an action against the ordinary, the plaintiff must allege and prove repairs of the pew. (1 Wils. 326).—[CHRISTIAN.]

(10) It has been determined, that stealing dead bodies, though for the improvement of the science of anatomy, is an indictable offence as a misdemeanor; it being considered a practice contrary to common decency, and shocking to

But to return to heir-looms: these, though they be mere chattels, yet cannot be devised away from the heir by will; but such a devise is void [n], even by a tenant in fee-simple. For, though the owner might, during his life, have sold or disposed of them, as he might of the timber of the estate, since, as the inheritance was his own, he might mangle or dismember it as he pleased; yet, they being at his death instantly vested in the heir, the devise (which is subsequent, and not to take effect till *after* his death) shall be postponed to the custom, whereby they have already descended [11].

[n] Co. Litt. 185. [1 P. Wms. 730.]

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the general sentiments and feelings of mankind. (2 T. R. 733; 2 Leach, 560, S. C.).

The principle is well described by Cicero—*de humatione unum tenendum est, contemnendam in nobis, non negligendam in nostris; ita tamen mortuorum corpora nihil sentire intelligamus. Quantum autem consuetudini famæque dandum sit, id curent vivi.* (Cic. 1 Tusc. c. 45).—[CHRISTIAN.] (See Russ. & R. C. C. 366; and stat. 2 & 3 Will. 4, c. 75).

(11) See, as to heir-looms, 1 Williams on Executors, 565, 3rd edition, and Wooddeson's Lectures, vol. 2, p. 380.

CHAPTER XXIX.

OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT.

In the present chapter we shall take into consideration three other species of title to goods and chattels.

V. Title by succession.

V. The fifth method, therefore, of gaining a property in chattels, either personal or real, is by *succession*: which is, in strictness of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies; and, therefore, the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate[a]. Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in succession by such a body, that succession need not be expressed: but the law will of itself imply it. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists[b]. And thus a lease for years, an [431] obligation, a jewel, a flock of sheep, or other chattel interest, will vest in the successors, by succession, as well as in the identical members, to whom it was originally given.

Distinction as to sole corporations.

But, with regard to sole corporations, a considerable distinction must be made. For, if such sole corporation be the representative of a number of persons; as the master of an hospital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who represented the whole convent; or the dean of some antient cathedral, who stands in the place of, and

[a] 4 Rep. 65. [b] Bro. Abr. t. *Estates*, 90. Cro. Eliz. 464.

represents in his corporate capacity the chapter; such sole corporations as these have, in this respect, the same powers as corporations aggregate have, to take personal property or chattels in succession. And, therefore, a bond to such a master, abbot, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society, of which he is in law the representative [c]. Whereas, in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession: and, therefore, if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it [d]. For, the word *successors*, when applied to a person in his political capacity, is equivalent to the word *heirs* in his natural; and as such a lease for years, if made to John and his heirs, would not vest in his heirs but his executors; so if it be made to John bishop of Oxford and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors. The reason of this is obvious: for, besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs, or such successors as are equivalent to heirs; it would also follow, that, if any such chattel interest (granted to a sole corporation and his successors) were allowed to descend to such successor, the property thereof must be in abeyance from the death of the present owner until the successor be appointed: and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner [e]; but a man's right therein, when once suspended, is gone for ever. This is not the case in corporations aggregate, where the right is never in suspense; nor in the other sole corporations before mentioned, who are rather to be considered as heads of an aggregate body, than subsisting merely in their own right: the chattel interest, therefore, in such a case, is really and substantially vested in the hospital, convent, chapter, or other aggregate body; though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the

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[c] Dyer, 48. Cro. Eliz. 464. [d] Co. Litt. 46. [e] Brownl. 132.

general rule, with regard to corporations merely sole, is this, that no chattel can go to or be acquired by them in right of succession [f] [1].

Two cases in which a corporation sole may take a chattel by succession.

Yet, to this rule there are two exceptions. One in the case of the king, in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors [g]. The other exception is, where, by a *particular* custom, some *particular* corporations sole have acquired a power of taking *particular* chattel interests in succession. And this custom, being against the general tenor of the common law, must be strictly interpreted, and not extended to any other chattel interest than such immemorial usage will strictly warrant.

Chamberlain of London.

Thus, the chamberlain of London, who is a corporation sole, may, by the custom of London, take *bonds* and *recognizances* to himself and his successors, for the benefit of the orphan's fund [h]: but it will not follow from thence, that he has a capacity to take a *lease for years* to himself and his successors for the same purpose; for the custom extends not to that: nor that he may take a *bond* to himself and his successors, for any other purpose than the benefit of the orphan's fund; for that also is not warranted by the custom. Wherefore, upon the whole, we may close this head with laying down this general rule; that such right of succession to

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chattels is universally inherent by the common law in all aggregate corporations, in the king, and in such single corporations as represent a number of persons; and may, by special custom, belong to certain other sole corporations for some particular purposes: although, generally, in sole corporations no such right can exist.

VI. Title by marriage.

VI. A sixth method of acquiring property in goods and chattels is by *marriage;* whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property, and with the same powers, as the wife, when sole, had over them.

This depends entirely on the notion of an unity of person between the husband and wife; it being held that they are

[f] Co. Litt. 46. [g] Ibid. 90. [h] 4 Rep. 65. Cro. Eliz. 862.

(1) See 7 B. & Cr. 113; 7 Bligh, 241, ante, p. 23, n. 6. The ornaments of a bishop's chapel belong to his successor, although mere chattels. (12 Rep. 106).

one person in law [1], so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a real estate, he only gains a title to the rents and profits during coverture: for that, depending upon feodal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the curtesy. But, in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chuses to take possession of them [2]: for, unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined [3].

Real estate of wife.

Chattels of wife.

There is, therefore, a very considerable difference in the acquisition of this species of property by the husband, according to the subject-matter; viz. whether it be a chattel *real*, or a chattel *personal*; and, of chattels personal, whether it be in *possession*, or in *action* only. A *chattel real* vests in the husband, not absolutely, but *sub modo*. As, in case of a lease for years, the husband shall receive all the

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Chattels real of wife.

[1] See book I. c. 15.

(2) See 2 You. & C. 526.

(3) If he assign her choses in action for a valuable consideration in her lifetime, and she survive, she is not bound at all, not even, according to the modern authorities, to the amount of the consideration, the entire interest survives to her. (1 Atk. 207; Cox's P. Wms. 380; 1 Russ. 1, 45; 9 Ves. 87; 2 Sim. 167; 1 Jac. & W. 457, 477; 9 Sim. 137; 7 Jur. 337). If the husband before marriage makes a settlement upon the wife in consideration of the wife's fortune, the representative of the husband will be entitled to all her choses in action; (3 P. Wms. 199; 14 Ves. 313; 5 Mad. 164); but if it is in consideration of part of the estate only, the residue not reduced into possession will survive to the wife; and where there is a settlement equivalent to the wife's fortune, though no mention of her personal estate be made, the husband's representative will be entitled to the whole. (See Butl. Co. Litt. 352). As to what amounts to a reduction into possession, see 5 Ves. 515; 12 Id. 497; 6 B. & Cr. 253; 5 Russ. 183; 9 Sim. 137; 1 Myl. & Cr. 53; 11 Sim. 388. It is settled that the wife's *reversionary* choses in action cannot be affected by the husband, even with her concurrence. (1 Russ. 1; 3 Id. 65; 1 Myl. & K. 41. See 1 You. & C. N. C. 715).

rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture [k]: if he be outlawed or attainted, it shall be forfeited to the king [l]; it is liable to execution for his debts [m]; and, if he survives his wife, it is to all intents and purposes his own [n]. Yet, if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will [o]: for, the husband having made no alteration in the property during his life, it never was transferred from the wife; but after his death she shall remain in her antient possession, and it shall not go to his executors. So it is also of chattels personal (or *choses*) in *action*; as debts upon bond, contracts, and the like: these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law [4]. And upon such receipt or reco-

Choses in action of wife.

[k] Co. Litt. 46. [See 5 Mee. & W. 142].
[l] Plowd. 263.
[m] Co. Litt. 351.
[n] Ibid. 300.
[o] Poph. 5. Co. Litt. 351.

(4) Where the wife's interest is merely equitable, or where the property, though in its nature legal, becomes, from collateral circumstances, the subject of a suit in equity, a court of equity will not assist the husband to reduce it into possession, unless on the terms of settling a part of it upon the wife and children, or, in case of an interest for her own life, upon her only, provided the wife insists on this her equity to a settlement. (1 Rop. H. & W. by Jacob, 258). There is no fixed rule as to the proportion which will be so settled; it may depend upon the existence of previous settlements, and the ability of the husband to maintain his wife. Under particular circumstances, the Court may be induced to preserve the whole of the fund for the wife and her children. (1 Rop. H. & W. 268; 1 Mad. 363; 6 Id. 32; 1 Sim. & St. 253; 3 You. & C. 230; 9 Sim. 597; 11 Id. 569; but see 1 Dru. & W. 407). It has been held, that this equity does not extend to a wife's equitable interest in chattels real; (1 Vern. 7; 2 Id. 18; 3 Atk. 435); but it may well be doubted whether this anomalous exception would now be admitted. (See 4 Ves. 19; 5 Myl. & Cr. 97). In a recent case, the wife's equity to a settlement was enforced against the assignees in insolvency of her husband, claiming, during the joint lives of the husband and wife, the entire benefit of a legal estate, vested in the wife for her life; the mere circumstance of there being an outstanding term of years obliging them to seek the assistance of equity. (5 Myl. & Cr. 97). Yet, in earlier cases, it has been held, that the wife has no equity in respect of a mere life estate against her husband's assignee for value. (5 Mad. 155, 414; 2 Myl. & K. 184; 2 Russ. & M. 175; see 7 Jur. 338).

It is not clear that the trustee can defeat this equity, by himself transferring the trust property to the husband, or his assignee, without suit. Upon the authority of two cases, in which the wife, coming as *plaintiff*, was held entitled to a settlement, (5 Ves.

very, they are absolutely and entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revest in the wife. But, if he dies before he has recovered or reduced them into possession, so that, at his death, they still continue *choses in action*, they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them[p5]. And so, if an estray comes into the wife's franchise, and the husband seises it, it is absolutely his property: but, if he dies without seising it, his executors are not now at liberty to seise it, but the wife or her heirs[q]; for the husband never exerted the right he had, which right determined with the coverture. Thus, in both these species of property the law is the same, in case the wife survives the husband; but in case the husband survives the wife, the law is very different with respect to *chattels real* and *choses in action:* for he shall have the *chattel real* by survivorship[6], but not the *chose in* [435]

[p] Co. Litt. 351. [q] Ibid.

737; 11 Sim. 569, and see 8 Jur. 27), it should seem that he cannot; but see 1 P. Wms. 458; 4 Ves. 18; 10 Id. 90; 1 Ves. & B. 300; 5 Myl. & Cr. 106.

Property, whether real or personal, may be settled in equity to the separate use of a married woman, so as to be completely out of the reach of her husband or his creditors, either by antenuptial contract, or, after marriage, by the declaration of the person who gives the property. (4 Vin. Ab. 13; 1 Ch. Cas. 225). And for this purpose, the intervention of a trustee is not essential; if the trust be declared, and the legal title vest in the husband himself, he will be a trustee for his wife. (2 Myl. & K. 427; Turn. & R. 222; 4 Myl. & Cr. 408). It is now settled, not only that property may be settled to the separate use of a woman during any *future* coverture, but that she may be prospectively restrained from anticipating or alienating her separate property during any future coverture; so that, though such trusts will not prevent her from disposing of her entire interest during an interval of discoverture, they will take effect upon her marriage, and protect whatever part of the property she may not have previously alienated from her improvidence during the marriage. (4 Myl. & Cr. 367, 377; 1 Beav. 1; 4 Jur. 34).

A wife is to be regarded as a feme sole in respect of her separate estate, and the produce of it, (see 9 Sim. 447), and her express engagements are, generally speaking, binding on her, (unless she is restrained from anticipation), as when she gives a bond or note, either as principal or surety; but the application of this doctrine is not free from difficulties. (See 2 P. W. 144; 9 Ves. 486; 15 Id. 596; 17 Id. 365; 5 Mad. 414; 4 Russ. 112; 2 Russ. & M. 355; 3 Myl. & K. 209; 2 Beav. 244; 4 Id. 319; 1 Cr. & Ph. 48; 12 Law J., N. S., Ch. 158).

(5) See 1 Nev. & P. 416. A negotiable instrument is, for this purpose, a chose in action. (6 M. & W. 423; 2 Mod. 133; see 11 Mee. & W. 42).

(6) And that free from the wife's antenuptial debts. (1 P. Wms. 461).

action[r]; except in the case of arrears of rent, due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII. c. 37. And the reason for the general law is this: that the husband is in absolute possession of the *chattel real* during the coverture, by a kind of joint-tenancy with his wife; wherefore the law will not wrest it out of his hands, and give it to her representatives; though, in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession[7]. But a *chose in action* shall not survive to him, because he never was in possession of it at all, during the coverture; and the only method he had to gain possession of it, was by suing in his wife's right: but as, after her death, he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. But he still will be entitled to be her administrator; and may, in that capacity, recover such things in action as became due to her before or during the coverture[8].

Thus, and upon these reasons, stands the law between husband and wife, with regard to *chattels real* and *choses in action:* but, as to *chattels personal* (or *choses*) *in possession,* which the wife hath in her own right, as ready money, jewels, household goods, and the like, the husband hath therein an immediate and absolute property, devolved to

[r] 3 Mod. 186.

(7) See 5 Scott, N. R. 464. A conditional assignment of the wife's term, as by way of mortgage, does not absolutely convert the property so as to bar the wife's title by survivorship. (1 Roll. Ab. 344; 2 Vern. 683). And even by paying off an antenuptial mortgage on the wife's term, the husband only acquires a lien for the amount. (Turn. & R. 180).

(8) If the husband die before administration, his administrator cannot sue for the wife's choses; but whoever obtains administration to the wife, will be a trustee for the husband's representatives. (2 B. & Ad. 273; 1 Myl. & K. 486; 10 Sim. 254). By 29 Car. 2, c. 3, s. 25, the husband shall have administration of all his wife's personal estate, which he did not reduce into his possession before her death, and shall retain it to his own use: but he must first pay his wife's debts before coverture; and if he die before administration is granted to him, or he has recovered his wife's property by the modern practice, the right to administer passes to his personal representative, and not to the wife's next of kin. (3 Hagg. 769; 4 Id. 289; 1 P. Wms. 378; 1 Atk. 458; 1 Mod. 231; Butler's Co. Lit. 351; 1 Wils. 168).

him by the marriage, not only potentially, but in fact, which never can again revest in the wife or her representatives [s].

And, as the husband may thus generally acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods; which shall remain to her after his death, and not go to the executors. These are called her *paraphernalia*; which is a term borrowed from the civil law [t], and is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife [9], suitable to her rank and degree; and therefore even the jewels of a peeress [10], usually worn by her, have been held to be *paraphernalia* [u]. These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives [w]. Neither can the husband devise by his will such ornaments and jewels of his wife; though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them or give them away [x]. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors where there is a deficiency of assets [y]. And her necessary apparel is protected even against the claim of creditors [11] [z]. Paraphernalia. [436]

[s] Co. Litt. 352.
[t] Ff. 23. 3. 9. § 3.
[u] Moor. 213.
[w] Cro. Car. 343. 1 Roll. Abr. 911. 2 Leon. 166.
[x] Noy's Maxims, c. 49. Grahme *v.* Lord Londonderry, 24 Nov. 1746. Canc.
[y] 1 P. Wms. 730.
[z] Noy's Max. c. 49.

(9) Also a necessary bed. (Com. Dig. *Baron et Feme*).

(10) Or of any married lady. (2 Atk. 77; 11 Vin. Abr. 180).

(11) The husband may dispose absolutely of his wife's jewels or other paraphernalia in his *lifetime*. (3 Atk. 394). And although after his death they are liable to his debts, if his personal estate is exhausted, yet the widow may recover from the *heir* the amount of what she is obliged to pay in consequence of her husband's specialty creditors obtaining payment out of her paraphernalia. (1 P. Wms. 730; 3 Atk. 369, 393).

But she is not entitled to them after his death, if she has barred herself by an agreement before marriage of every thing she could claim out of his personal estate either by the common law or custom. (2 Atk. 642).—[CHRISTIAN.]

Where the husband permits the wife to make profit of certain articles for her own use, or in consideration of her

VII. Title by judgment.

VII. A judgment, in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party. And here we must be careful to distinguish between property, the *right* of which is before vested in the party, and of which only *possession* is recovered by suit or action; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and judgment of the law. Of the former sort are all debts and *choses in action;* as, if a man gives bond for 20*l.* or agrees to buy a horse at a stated sum, or takes up goods of a tradesman upon an implied contract to pay as much as they are reasonably worth: in all these cases the right accrues to the creditor, and is completely vested in him, at the time of the bond being sealed, or the contract or agreement made; and the law only gives him a
[437] remedy to recover the possession of that right, which already in justice belongs to him. But there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time; and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

1. Penalties.

1. Such penalties as are given by particular statutes, to be recovered on an action *popular;* or, in other words, to be recovered by him or them that will sue for the same. Such as the penalty of 500*l.* which those persons are by several acts of parliament made liable to forfeit, that, being in particular offices or situations in life, neglect to take the oaths to the government: which penalty is given to him or

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supplying the family with particular necessaries, or makes her a yearly allowance for keeping house, the profits or savings will be considered in equity as the wife's separate estate; (Pre. Ch. 44; 3 P. Wms. 337; 2 Eq. Ca. Abr. 156, in marg.); except as against creditors, (Pre. Ch. 297); see also 1 Vern. 244; 2 Vern. 535; 1 Eq. Ca. Abr. 346, pl. 18; 1 Atk. 278. Chattels purchased by the wife out of her separate estate, and the savings of her separate estate, belong at law to the husband, unless they are vested in a trustee for her. (7 Mee. & W. 183; 5 Scott, N. R. 464; see 10 Sim. 254).

them that will sue for the same. Now here it is clear that no particular person, A or B, has any right, claim, or demand, in or upon this penal sum, till after action brought [a]; for he that brings his action, and can *bona fide* obtain judgment first, will undoubtedly secure a title to it, in exclusion of every body else. He obtains an inchoate imperfect degree of property, by commencing his suit: but it is not consummated till judgment; for, if any collusion appears, he loses the priority he had gained [b]. But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a pardon which shall be a bar to all the world) cannot after suit commenced remit any thing but his own part of the penalty [c]. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest. This therefore is one instance, where a suit and judgment at law are not only the means of recovering, but also of acquiring, property. And what is said of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any person that will sue for the same. They are placed as it were in a state of nature, accessible by all the king's subjects, but the acquired right of none of them: open therefore to the first occupant, who declares his intention to possess them by bringing his action; and who carries that intention into execution, by obtaining judgment to recover them.

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2. Another species of property, that is acquired and lost by suit and judgment at law, is that of *damages* given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after verdict; but, when the jury has assessed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum. It is true, that this is not an acquisition so perfectly original as in the former instance: for here

2. Damages.

[a] 2 Lev. 141. Stra. 1169. Combe *v.* Pitt, B. R. Tr. 3 Geo. III.

[b] Stat. 4 Hen. VII. c. 20.

[c] Cro. Eliz. 138. 11 Rep. 65.

the injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a *new* title in him, as fix and ascertain the *old* one; they do not *give*, but *define*, the right. But, however, though strictly speaking the primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction; yet, as the legal proceedings are the only visible means of this acquisition of property, we may fairly enough rank such damages, or satisfaction assessed, under the head of property acquired by suit and judgment at law.

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3. Costs.

3. Hither also may be referred, upon the same principle, all title to costs and expenses of suit; which are often arbitrary, and rest entirely on the determination of the court, upon weighing all circumstances, both as to the *quantum*, and also (in the courts of equity especially, and upon motions in the courts of law) whether there shall be any costs at all. These costs therefore, when given by the court to either party, may be looked upon as an acquisition made by the judgment of law.

CHAPTER XXX.

OF TITLE BY GIFT, GRANT, AND CONTRACT.

WE are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*: whereof the former vests a property in *possession*, the latter a property in *action*[1].

VIII. Gifts, then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always gratuitous, *grants* are upon some consideration or equivalent: and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal*. Under the head of gifts or grants of chattels *real*, may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twentieth chapter of the present book, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and in case of leases, always reserving a rent, though it be but a peppercorn; any of which considerations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

VIII. Title by gift or grant.

Of chattels real.

Grants or gifts, of chattels *personal*, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all

[441]

Of personal chattels.

(1) See some branches of the subject of this chapter more fully treated in Serjeant Stephens's Commentaries, B. 2, pt. 2, c. 5.

title and interest therein: which may be done either in writing, or by word of mouth[a] attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious; and is usually construed to be fraudulent, if creditors or others become sufferers thereby. And, particularly, by statute 3 Hen. VII. c. 4, all deeds of gift of goods, made in trust to the use of the donor, shall be void: because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture; and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz. c. 5, every grant or gift of chattels, as well as lands, with an intent to defraud creditors or others[b], shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and effectual: and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved; and also on conviction shall suffer imprisonment for half a year[2].

Fraudulent gifts. Stat. 3 Hen. 7, c. 4.

Stat. 13 Eliz. c. 5.

Gift not complete

A true and proper gift or grant is always accompanied

[a] Perk. § 57.

[b] See 3 Rep. 82.

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(2) Vide ante, p. 296, n. 4. The question of fraud, under this statute, is properly one of fact to be determined by a jury. The leading case on the subject is *Twyne's case*, (3 Rep. 80), which settled that an absolute sale of goods, with a retention of the possession by the vendor, is generally void against creditors; unless indeed the circumstances attending the sale are sufficient to give a notoriety to the change of ownership, and repel any presumption of fraud and concealment. (2 Bos. & P. 59; 1 Mau. & S. 251; 4 B. & Cr. 652).

Retention of possession, where it is consistent with the actual contract, and that contract is founded on good faith, will not be regarded as fraudulent within this statute; although, as will be presently seen, (*infra*, p. 488, n.), such retention of possession may render the transaction void as against the claims of assignees in bankruptcy or insolvency. Thus a pledge or conditional sale of goods is perfectly consistent with the mortgagor's keeping them in his possession, and is not invalidated by the statute of Elizabeth in consequence of that circumstance. (3 B. & Ad. 498). And where the property comes originally into the possession of one person as trustee for another, such possession is not fraudulent, and the goods will be protected from the creditors of the trustee. (1 Hare, 560).

An assignment, for the benefit of the general body of creditors, in order to protect the property against the execution of a particular creditor, is not avoided by this statute. (3 Mau. & S. 371; see 5 Ad. & E. 28).

with delivery of possession, and takes effect immediately[3]: as if A gives to B 100*l.*, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompense[c]: unless it be prejudicial to creditors; or the donor were under any legal incapacity[4], as infancy, coverture, duress, or the like; or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety, or surprize[5]. But if the gift does not take effect, by delivery of immediate possession, it is then not properly a gift, but a contract: and this a man cannot be compelled to perform, but upon good and sufficient consideration, as we shall see under our next division.

without delivery of possession.

[442]

IX. A contract, which usually conveys an interest merely in action, is thus defined: "an agreement upon sufficient consideration, to do or not to do a particular thing." From which definition there arise three points to be contemplated in all contracts; 1. The *agreement:* 2. The *consideration:* and 3. The *thing* to be done or omitted, or the different species of contracts[6].

IX. Title by contract.

First, then, it is an *agreement*, a mutual bargain or convention; and therefore there must at least be two contracting

1. It is an agreement;

[c] Jenk. 109.

(3) In Clayt. 135, it was said, that if A., being at York, give his horse in London to I. S., the latter may have trespass without other possession; (F. N. B. 140; Perkins, 30); and that, though by the civil law a gift of goods is not good without delivery, yet it is otherwise in our law. (1 Rol. R. 61; Vin. Ab. *Gift*). This is true only where there is either a deed of gift, or a consideration for the grant. (2 B. & Ald. 551; vide infra, 449, n.)

(4) There are certain subject matters which are not capable of assignment, (except partially and under special provisions, for the benefit of the creditors of an insolvent, 1 & 2 Vict. c. 110, s. 56): such are the pay of a military or naval officer, or the profits of any public office of trust. (3 T. R. 681; 4 Id. 248; 1 Swanst. 74; 2 Id. 108; 3 You. & J. 148; 8 M. & W. 149; stat. 11 Geo. 4, c. 20, s. 47). What is called the sale of public appointments is prohibited by statute; 5 & 6 Ed. 6, c. 16; 49 Geo. 3, c. 126; see Turn. & R. 459; 6 J. B. Moore, 28.

(5) See 3 You. & C. 586.

(6) Certain contracts are required by the statute of frauds to be in writing, signed by the party to be charged, or his agent. (Vide ante, p. 306, n.) Although in one sense mutuality is essential to an agreement, it is settled that a contract, signed by the party on one side only, may be enforced against him. (3 Scott, 249; 3 Myl. & K. 353).

parties, of sufficient ability to make a contract: as where A contracts with B to pay him 100*l.*, and thereby transfers a property in such sum to B. Which property is however not in possession, but in action merely, and recoverable by suit at law; wherefore it could not be transferred to another person by the strict rules of the antient common law: for no *chose* in action could be assigned or granted over[d], because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though, in compliance with the antient principle, the form of assigning a *chose* in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when in common acceptation a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee. But the king is an exception to this general rule, for he might always either grant or receive a *chose* in action by assignment[e]: and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose* in action, as much as the law will that of a *chose* in possession[f].

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Express;

or implied.

This contract or agreement may be either express or implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deserves[7]. If I take up wares from a tradesman, without any agreement of price, the law con-

[d] Co. Litt. 214. [e] Dyer, 30. Bro. Abr. tit. *Chose in action*, 1 & 4. [f] 3 P. Wms. 199.

(7) So every one who undertakes any office, employment, trust, or duty, impliedly contracts with his employers to do it with integrity, diligence, and skill, (infra, vol. 3, p. 163); and he impliedly contracts to do whatever is fairly within

cludes that I contracted to pay their real value. And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants, viz. that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (when not in actual possession) do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them: which indeed is the method taken by the civil law; it having referred the greatest part of the duties and rights, which it treats of, to the head of obligations *ex contractu* and *quasi ex contractu* [g].

A contract may also be either *executed*, as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together: or it may be *executory*, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract *executed* (which differs nothing from a grant) conveys a *chose in possession;* a contract *executory* conveys only a *chose in action.*

Executed;

or executory.

Having thus shewn the general nature of a contract, we are, secondly, to proceed to the *consideration* upon which it is founded; or the reason which moves the contracting party to enter into the contract. "It is an agreement, upon *sufficient consideration.*" The civilians hold, that, in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal [h]. This thing, which is the price or motive [8] of the contract, we

2ndly. Contract must be on sufficient consideration.

[444]

[g] Inst. 3. 14. 2.

[h] *In omnibus contractibus, sive nominatis sive innominatis, permutatio continetur.* Gravin. l. 2, § 12.

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the scope of his employment. Therefore an agent for a merchant abroad, who had received instructions to insure the goods consigned to him, was held liable for having omitted to do so, without duly informing his principal of his inability to effect the insurance. (6 Scott, 761). Where the general engagement upon which any particular promise is implied is under seal, the implied promise has the force of a covenant. (1 Saund. 391). Implied promises, or promises in law, only exist where there is no express stipulation between the parties touching the same matter, for *expressum facit cessare tacitum.* (2 T. R. 105; 7 Scott, 69; 1 Nev. & P. 633).

(8) The motive to a contract must

call the consideration: and it must be a thing lawful in itself, or else the contract is void. A *good* consideration, we have before seen[i], is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another[j 9]. This consideration may sometimes however be set aside, and the contract become void, when it tends in its consequences to defraud creditors or other third persons of their just rights. But a contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity: for the person contracted with has then given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person[10].

[i] Page 297. [j] 3 Rep. 83.

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be distinguished from the legal consideration. Thus, an agreement by executors, out of regard to the known wishes of their testator, to assign a leasehold house to A., she paying 1*l.* towards the ground rent and repairing the house, is good in law, on account of the agreement to pay the ground-rent and to repair, although the true motive or inducement acting upon the executors, namely, regard to their testator's wishes, is not a legal consideration. (2 Gale & D. 226; 2 Q. B. R. 851).

(9) This, though good to support a use under the statute, or a trust executed in equity, is no consideration for an assumpsit. Infra, p. 445, n. (12).

(10) If there be no fraud in the transaction, mere inadequacy of price would not be deemed, even in equity, sufficient to vacate a contract. (10 Ves. 292, 295; 2 Hare, 410, 450). Nor is mere folly without fraud a foundation for relief. (8 Price, 620). But a sale of a reversionary interest, or a post obit bond by an expectant heir, may be set aside in equity on the ground of inadequacy of price. (17 Ves. 20; 3 Russ. 433). There is some uncertainty as to the application of this rule, and it has been said not to apply where the expectant heir, or reversioner standing in the situation of an expectant heir, did not conceal the transaction from the father, or from the person standing in loco parentis; the person, for example, from whom the spes successionis was entertained, or after whom the reversionary interest was to become vested in possession; although such parent, or quasi parent, stood merely passive. (2 Atk. 535; 10 Ves. 429; 2 Myl. & K. 456. See 2 Russ. & M. 88; 7 Cl. & Fin. 436; 4 Beav. 401).

On the question of executing an agreement, hardship cannot be regarded, unless it amount to a degree of inconvenience and absurdity, so great as to afford judicial proof that such could not be the meaning of the parties. (1 Swans. 329). But if there be such an inadequacy as to shew that the person did not understand the bargain he made,

Valuable consideration.

These valuable considerations are divided by the civilians [k] into four species: 1. *Do, ut des:* as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of re-payment; and all sales of goods, in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio, ut facias:* as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides. Or, it may be to forbear on one side on consideration of something done on the other; as, that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides; as, that [445] in consideration that A will not trade to Lisbon, B will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is *facio, ut des:* when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, *do, ut facias:* which is the direct counterpart of

[k] Ff. 19. 5. 5.

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or, that knowing it, he was so oppressed that he was glad to make it; this will shew such a command over the grantor as may amount to fraud. (2 Br. C. C. 167). An action was brought on an agreement to pay for a horse a barley corn for the first nail in the horse's shoes, and for each succeeding nail double the last; which came to five hundred quarters of barley; and, on a trial before Holt, C. J., the jury gave the value of the horse; from which it is to be collected, the bargain was considered valid. (1 Lev. 111). And in an action of assumpsit, in consideration of 2*s.* 6*d.* paid, and 4*l.* 17*s.* 6*d.* to be paid, the defendant undertook to deliver two rye corns next Monday, and, every succeeding Monday, double the last, for a year, which would have required the delivery of more rye than was grown in all the world. On demurrer, Probyn, J., said, that though the contract was a foolish one, yet it would hold in law, and the defendant ought to pay something for his folly; and on this the defendant offered to refund the 2*s.* 6*d.* and costs, which was accepted. (2 Ld. Raym. 1164). — [CHITTY.]

the preceding. As when I agree with a servant to give him such wages, upon his performing such work: which, we see, is nothing else but the last species inverted; for *servus facit, ut herus det,* and *herus dat, ut servus faciat.*

Nudum pactum is void.

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum,* or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law: and a man cannot be compelled to perform it[l][11]. As if one man promises to give another 100*l.*, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honour or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted[m] the maxim of the civil law[n], that *ex nudo pacto non oritur actio.* But any degree of reciprocity will prevent the pact from being nude: nay, even if the thing be founded on a prior moral obligation, (as a promise to pay a just debt, though barred by the statute of limitations), it is no longer *nudum pactum*[12]. And as this

[l] Dr. & St. d. 2. c. 24. [m] Bro. Abr. tit. *Dette,* 79. Salk. 129. [n] Cod. 2. 3. 10. & 5. 14. 1.

(11) See a very learned dissertation upon this passage and the learned Judge's observation and reference upon a *nudum pactum* in the preceding page, by Mr. Fonblanque, in his edition of the Treatise of Equity, 1 vol., p. 326. That learned gentleman abundantly proves that a consideration was not necessary to constitute a binding contract in the civil law; and he concludes, that "from a view of the different modes by which an obligation could be created by the civil law, it appears that, without any consideration, a verbal agreement or promise might, in respect of certain prescribed solemnities, acquire a binding force and legal validity; and further, that, for want of a consideration, a written acknowledgment of a debt might be avoided; and that, though a consideration was alleged in writing, it might be denied. If then it be asked, what was a *nudum pactum* by the civil law? I should submit that, from the above observations, it appears to have been an undertaking to give or to do some particular thing or act, which *neque verbis præscriptis solemnibus vestitum sit, neque facto aut datione rei transit in contractum innominatum.*"—[CHRISTIAN.]

(12) The consideration requisite to support an assumpsit must be a benefit derived by the party promising, and not by a third person (4 B. & Ad. 433), from the party for whose benefit the promise is made, *or* an inconvenience sustained, or liability incurred, by the latter, *in expectation* of the matter of the promise being performed. (Strange, 592; 1 Moo. & Sc. 40; 4 B.

rule was principally established, to avoid the inconvenience that would arise from setting up mere verbal promises, for

& Cr. 3; 1 Cr., M., & R. 422; 8 Ad. & E. 743. See 2 Man. & S. 393). Any damage, or any suspension or forbearance of his right, or even the giving up of a document which was not available at law (2 Per. & D. 484; see 5 B. & Al. 117); or any possibility of loss (as by promising to do something in future), acquiesced in by, or occasioned to, the promisee, on account, or by reason of the promise, is a sufficient consideration, and will make the promise binding, although no actual benefit accrues to the party undertaking. (1 Wms. Saund. 211 b; 4 Taunt. 611; 4 B. & Cr. 8; 7 Scott, 711; 2 Per. & D. 477; 11 Mee. & W. 256). This implies a previous request on the part of the promisor:—"a mere voluntary curtesy will not have a consideration to uphold an assumpsit; but if that curtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, is not naked, and couples itself with the suit before, and the merits of the party procured by that suit." (Hob. 105; 1 Smith Lead. Cas. 673). Thus, if a woman incurs a debt, and afterwards marries, the consideration does not extend to her husband, who can be sued only by joining her; and his promise to pay, after the debt incurred, and after marriage, is (unless made as the price of some forbearance by the creditor, &c.) void, because there was no previous consideration at his request. (3 Per. & D. 285). In a recent case, it was held that a servant who had, according to the contract made at his hiring, forfeited his wages for drunkenness, could not recover upon a subsequent promise by his master to pay them. (3 Per. & D. 182). This decision seems to be inconsistent with the rule as to clauses of forfeiture in leases, which are held to be operative only at the option of the lessor.

Natural affection, though a good consideration to raise a use, is not a sufficient ground for an assumpsit. Nothing moves from the promisee; no request is made by the promisor. (Cr. El. 755; 1 Sid. 38). Nor is a mere moral obligation a sufficient consideration. (4 B. & Al. 652.)

If the abandonment of a prior contract is relied upon as a consideration for the new promise, it must be shewn that the abandoned contract was binding. (1 Bos. & P. 306). If, by reason of any incapacity (such as that of coverture, see 2 B. & Ad. 811), fraud, illegality, want of consideration, or otherwise, a contract be void, and not merely voidable, no subsequent express promise will charge the party promising, even though he has received a benefit pursuant to the terms of the contract. (2 Wms. Saund. 137 d; 3 Nev. & P. 285). An express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law (such as the statute of limitations or the statute of frauds), but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. (3 Bos. & P. 249, n.; 1 Moo. & P. 227; 2 Car. & P. 383). The doctrine in *Lee* v. *Muggeridge*, (5 Taunt. 36), may be considered as overruled. (See 3 Per. & D. 283). The statute 9 Anne, c. 16, prohibits usury, and declares all *securities* for the principal to be void; but where money was lent upon usury, and securities were given, and the parties subsequently abandoned the usurious contract, and destroyed

which no good reason could be assigned [o], it therefore does not hold in some cases, where such promise is authentically

[o] Plowd. 308, 309.

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the illegal securities, the antecedent loan was held to be a sufficient consideration for a new promise to pay the principal and lawful interest. (2 Taunt. 184; see 2 Stark. 90). Even an express promise on sufficient consideration, the remedy on which is barred by the statute of limitations, may, it seems, be revived by a new promise, although the circumstances were never such as a promise could have been implied from. It must be remembered, however, that a mere agreement, not under seal, for an *accord*, not being binding on him who has the right of action, does not amount to a new promise, so as to prevent the statute of limitations from running on the original contract. If a creditor agrees to accept a mere composition or goods in satisfaction of his debt, this is not binding on him until it is executed by acceptance of the composition or goods. (Cowp. 129). In no case can the original debt be extinguished, without actual performance and acceptance of the accord, or a deed. (2 H. Bl. 317; 1 Mee. & W. 323). But a promise by a third person to pay the debt is a sufficient consideration for an agreement to give time; (Cowp. 129; 2 H. Bl. 312); and so is a promise *to* a third person, (*e. g.* the assignee of a bond), to pay the debt, a sufficient consideration for a promise by such person to forbear to use the remedies under his control, for in either case a new debt is constituted. (2 Nev. & P. 302). When the obstacle which the new promise is used to remove is infancy, it has been thought that a mere express promise during infancy would not be sufficient, but that the transaction must be such as would, against an adult, raise a promise in law; but this seems to be inconsistent with the now settled law, that an account stated (see 4 Mee. & W. 34) by an infant is a good consideration, and may be ratified by him after attaining his full age. (11 Mee. & W. 256). It has been laid down generally that a party of full age may ratify and make himself liable on any contract made during infancy. (Id.)

The consideration necessary to support an assumpsit or promise, then, involves two things—the benefit flowing to the maker of the promise, or the inconvenience sustained by him to whom it is made,—and the request, which is the occasion of such benefit being received, or inconvenience sustained, both of which elements are essential to a complete consideration. In respect of the former, the consideration may be *executed* or *executory;* while, on the other hand, the request may be either *express* or *implied.* If the consideration is executory when the promise is made, *i. e.* if it be a counter promise, it necessarily implies a request; (4 Scott, 467); if it be then executed, a prior request must be shewn. (Id.; Bac. Ab. *Assumpsit* (D.); 2 Stark. 175). A consideration, executed at the time of the promise, or executory then (which is the same thing, for the counter *promise* is the consideration), is sometimes called *concurrent;* while a promise made in reference to an existing liability, is said to be founded on a *continuing* consideration. A familiar instance of an implied request is, where the act done by the party from whom the consideration moves, is one which he is compelled to do, but to the performance of which the other party was primarily liable; or where a benefit voluntarily offered is accepted and enjoyed, in which case

proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the

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the law implies not only a request, but a promise of indemnity or recompense. (1 Cr. & M. 819). As where a tenant is obliged to pay taxes or charges, which it is the landlord's duty to discharge, (6 Taunt. 524; see 3 Ad. & El. 331), or a surety is compelled to pay his principal's debt. (2 T. R. 100; 3 B. & Ad. 407; 8 Ad. & E. 136; 2 Scott, N. R. 45). When the act is done without compulsion or liability to compulsion, (8 Mee. & W. 538), and the party legally liable afterwards expressly promises an indemnity, the previous request is implied, though the promise would not have been. (3 Bos. & P. 250, n.; 1 B. & Al. 109; 1 Smith, L. C. 70). It has also been said, that a performance of that which another person is *morally*, though not legally, bound to do, is a sufficient consideration to support a subsequent express promise; and this doctrine, though sometimes expressed in terms which have lately been disapproved of, may perhaps be supported in this confined sense, that such a moral obligation, coupled with a subsequent express promise, raises the implication of a request, if, *at the time the service was done*, the party was sui juris, and competent to make a binding contract. In such a case, it will be observed, the moral obligation is between the promisor and a third person, and being already in existence before the act done by the promisee, is used to found the implication of a request. But where the moral obligation arises between the parties themselves as a *consequence* of the act done, it is not sufficient to support the subsequent promise, unless, as before stated, it is a relic of some more stringent liability. (See Bull. N. P. 129, 147, 281; 5 Taunt. 36; 2 East, 506; 1 B. & Al. 104; 2 B. & Ad. 811; 3 Nev. & P. 283; 1 Cr. & M. 810; 3 Bos. & P. 251, n). The distinction between the cases of married women and infants, that a benefit received during the disability will not sustain an express promise after it has ceased in the former case, but will in the latter, is founded on the peculiar natures of the respective disabilities, the contracts of a married woman being generally void, those of an infant voidable only. (3 Nev. & P. 462; but see 2 Stark. 90.)

It may be here observed, that a father, who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a mere stranger would be. (6 Mee. & W. 486; see 4 East, 60; 3 Per. & D. 283).

Although the consideration was executed upon an express request, a subsequent express promise going beyond what would have been implied by law, will not be supported by such consideration; in other words, a consideration, past and executed, (and a binding promise once entered into is an executed consideration), will support no other promise than such as would be implied by law. (8 Mee. & W. 790). Thus an executed sale of goods will not support a subsequent express warranty, exceeding the warranty implied by law. (2 Gale & D. 508; see 7 Dowl. P. C. 781; 2 Mee. & W. 143). Of course, if the consideration was executed contemporaneously with or subsequently to the express promise, the latter is binding, although it goes beyond the consideration. (See 1 Per. & D. 46). In a modern case, however, it seems to have been held, that an express promise to pay at a future day, made at the time of stating an account, is void; the only promise implied from an account stated being to pay immediately. (5 Mee. & W. 241; see 2 Per. & D. 256).

instrument [p], and every note from the subscription of the drawer [q13], carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract.

3rd. To do or omit some act.

We are next to consider, *thirdly*, the thing agreed to be done or omitted. "A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing.*"

The four contracts.

The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are, 1. That of *sale* or *exchange*. 2. That of *bailment*. 3. That of *hiring* and *borrowing*. 4. That of *debt*.

1st. Sale or exchange.

1. Sale or *exchange* is a transmutation of property from one man to another, in consideration of some price or recompense in value: for there is no sale without a recompense; there must be *quid pro quo* [r]. If it be a commu-

[p] Hardr. 200. 1 Ch. Rep. 157. [q] Ld. Raym. 760.
[r] Noy's Max. c. 42.

(13) Mr. Fonblanque, in his discussion of the subject of consideration, referred to in the last note but one, has taken notice of this inaccuracy. He says, what certainly is fully established, that the want of consideration cannot be averred by the maker of a note, if the action be brought by an indorsee; but if the action be brought by the payee, the want of consideration is a bar to the plaintiff's recovering upon it. (1 Stra. 674; Bull. N. P. 274; 1 B. & P. 651; 2 Atk. 182). An indorsee, who has given full value for a bill of exchange, may maintain an action both against him who drew it, and him who accepted it without any consideration. (4 T. R. 339, 471; 5 Esp. 178; 3 Esp. 46). The most important authority respecting the consideration of written contracts is the case of *Rann* v. *Hughes*, before the House of Lords, in which Lord Chief Baron Skynner delivered the unanimous opinion of the Judges, that an administratrix was not bound by a written promise to pay the debt of her intestate out of her own property. (See it reported in 7 T. R. 350). In that case, the Chief Baron said, that "all contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved. He observed that the words of the statute of frauds were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing, and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing the party must be at all events liable. So a promise to pay the debt of another is void, unless a legal consideration is stated in the written agreement.—[CHRISTIAN.]

tation of goods for goods, it is more properly an *exchange;* but, if it be a transferring of goods for money, it is called a *sale:* which is a method of exchange introduced for the convenience of mankind, by establishing an universal medium, which may be exchanged for all sorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome[14]. All civilized nations adopted therefore very early the use of money; for we find Abraham giving "four hundred shekels of silver, current money with the merchant," for the field of Machpelah[s]: though the practice of exchanges still subsists among several of the savage nations. But, with regard to the *law* of sales and exchanges, there is no difference. I [447] shall therefore treat of them both under the denomination of sales only; and shall consider their force and effect, in the first place, where the vendor *hath* in himself, and secondly where he *hath not* the property of the thing sold.

Sale after execution.

Where the vendor *hath* in himself the property of the goods sold, he hath the liberty of disposing of them to whom ever he pleases, at any time, and in any manner: unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff[15]. For then, by the statute of frauds[t], the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt, from the time of delivering the writ. Formerly it was bound from the *teste,* or issuing, of the writ[u], and any subsequent sale was fraudulent; but the law was thus altered in favour of *purchasors,* though it still remains the same between the *parties:* and therefore if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors[v 16].

[s] Gen. c. 23, v. 16. [t] 29 Car. II. c. 3. [u] 8 Rep. 171. 1 Mod. 188. [v] Comb. 33. 12 Mod. 5. 7 Mod. 95.

(14) A sale differs from an exchange of goods in this respect, among others, that on the latter contract mutual warranties of the *quality* of the articles exchanged are not easily implied. (3 Camp. 351).

(15) See 3 Per. & D. 570. The delivery of the writ does not divest the property out of the debtor, nor does the seizure by the sheriff; and before seizure, a sale in market overt will defeat the sheriff's title. (3 Mee. & W. 622).

(16) If two writs are delivered to

Contract when complete.

If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says, he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases[w]. But, if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest*, (which the civil law calls *arrha*, and interprets to be *emptionis-venditionis contractae argumentum*[x]"), the property of the goods is absolutely bound by it: and the vendee may recover the goods by action, as well as the vendor may the price of them[y]. And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute, 29 Car. 2, c. 3, no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part; or unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract[17]. And,

Earnest.

[448]

What contracts for sale must be in writing.

[w] Hob. 41. Noy's Max. c. 42. [x] Inst. 3, tit. 24. [y] Noy's Max. c. 42.

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the sheriff on the same day, he is bound to execute the first which he receives; but if he levies and sells under the second, the sale to a vendee, without notice of the first, is irrevocable, and the sheriff makes himself answerable to both parties. (1 Salk. 320; 1 T. R. 729).—[CHRISTIAN.] (See 3 Per. & D. 570).

(17) In construing the statute of frauds, the principal difficulty has arisen in determining what acts between the parties amount to a delivery on the one part and acceptance on the other. An *actual* delivery by the seller, and acceptance by the buyer, is not necessary in all cases: as, where the goods are ponderous, delivery of the key of the warehouse in which they are deposited, or by delivery of other tokens of property, is sufficient. (1 Atk. 170; 1 East, 194). Or payment of warehouse rent by the purchaser. (1 Camp. 452). Where goods are sold by sample, delivery of the sample to the purchaser may be part delivery within the statute; (5 Esp. 267; 7 East, 564); but it is otherwise if the sample be not part of the bulk. (7 T. R. 14; Holt, 179). Deli-

with regard to goods under the value of 10*l.*, no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith. Antiently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called *hand-sale*, "*venditio per mutuam manuum complexionem*[z];" till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof. Handsel.

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on[a]. But, if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B for 10*l.* and B pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because by the contract, the [449]

[z] Stiernhook de Jure Goth. l. 2, c. 5. [a] Hob. 41.

very of an order by the seller, to a wharfinger or warehouseman who has the custody of the goods, to deliver them to the vendee, is sufficient to satisfy the statute. (2 Esp. 598). So, if a purchaser write his name or initials upon the article bought, it will suffice; but other articles bought at the same time will not pass, unless the signature is put upon them also. (1 Camp. 233, 235, n.). But where the defendant agreed to purchase a horse for ready money, and to take it at a distant specified day, before which day defendant rode the horse and gave directions as to its treatment, but requested that it might remain in plaintiff's possession for a further time, when he would fetch it away, and pay the price, to which plaintiff assented, and the horse died in the interval, it was held that there was no acceptance of the horse within the meaning of the statute of frauds. In this case there was no earnest given, nor part payment, nor any note or memorandum in writing, which distinguishes it from the case in the text; and as it was a ready-money bargain, the purchaser could have no right to take away the horse till the price was paid, and of course there could be no acceptance on the part of the defendant. (3 B. & Al. 681).—[CHITTY.]

property was in the vendee[b]. Thus may property in goods be transferred by sale, where the vendor *hath* such property in himself[18].

[b] Noy, c. 42.

(18) A gift or grant, or declaration of trust of a personal chattel, may be made without writing; and an unwritten contract for the purchase of a debt, though secured upon real estate, may be good. (3 Mau. & S. 7; 1 N. R. 124; 1 Sim. & St. 607; 1 Myl. & K. 506; 3 Myl. & Cr. 673).

When the assignment is made by deed, which is called a bill of sale, it passes the property without consideration, and without delivery of possession; the want of either of which may, however, by evincing fraud, occasion the assignment to be avoided on that ground. (2 B. & Al. 551; 1 Cr., M. & R. 782; 1 Hare, 557).

When the transfer is not made by deed, but by words, either spoken, or written and not sealed, (it is immaterial which, unless in cases where writing is made essential by some statute, as by the Statute of Frauds, ante, p. 306, n.; by the Ship Registry Act, 3 & 4 Will. 4, c. 55; by the Annuity Act, 53 Geo. 3, c. 141; by the Copyright Acts, as interpreted by the Courts, (2 B. & Cr. 861), &c.), delivery of possession passes the property, whether a consideration moves from the other party or not (subject always to inquiry as to the bona fides of the transaction); but when delivery does not accompany the contract, a consideration is necessary; (2 B. & Al. 551); and it will then depend upon circumstances, whether the property in the goods passes at once to the vendee or not. The right of property may pass immediately, and the right of immediate possession may not pass. If the right of possession passes at once, without any condition precedent to be performed by the vendee, he may recover the goods in trover, as, in case there is a condition precedent, he may do after performance, or tender of performance, of the condition. But although the right of possession does not immediately pass, yet, if the right of property passes, any subsequent loss or damage of the goods will fall upon the vendee. The fact that the goods are not to be paid for until a future time, nor to be delivered until paid for, does not prevent the property from immediately passing. The rule is, that where there is an immediate sale, and *nothing remains to be done by the vendor as between him and the vendee*, (see 7 East, 570), the property in the thing sold vests in the vendee. (6 B. & Cr. 364; 5 B. & Ad. 340). Thus, where it was agreed that the price should be paid by a bill at two months from the date of landing the goods, and the goods were lost at sea, it was held that the vendor could recover the price. (1 Scott, 281, 630). If a verbal order for goods above the value of 10*l.* is given, the property does not pass until the goods are accepted by the buyer; and, therefore, in cases of loss during the carriage, the vendor is the party to sue the carrier, at any rate where the latter was not named by the consignee. (2 Gale & D. 552; see 6 Cl. & Fin. 600).

When the contract is for a present sale, and earnest is given by payment of part of the price, or delivery of part of the goods, both parties are bound, and the property is changed, but subject to a right in either party to rescind the contract, if the other unreasonably delays to perform his part, and *thereby* again to change the property in the goods. After earnest given, the vendor cannot sell the goods to another without

But property may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods [19]: for

Sale by one who is not the owner.

a default in the vendee; and, therefore, if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him; and then, if he do not come and pay for the goods in a convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to any other person. (Salk. 113; Noy, 88; 7 East, 570; 5 Mee. & W. 538; but see 1 Gale & D. 5).

If anything remain to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property does not pass. (6 East, 625; 2 Man. & S. 397). This may be where something is to be done to the goods by the vendor to fit them for delivery; (see 4 Ad. & E. 466; 2 M. & W. 802; 4 Scott, N. R. 471); or where the identity of the goods is not yet ascertained by selecting or weighing them from a larger quantity; or where the price is not ascertained, but is to be determined by weighing the goods, &c. (6 B. & Cr. 392; 2 Cr. & Phill. 530; 5 B. & Ad. 340; 9 Ad. & E. 900; 4 Mee. & W. 698).

As the property may pass while the goods remain in possession of the vendor, so it may pass while they remain in the hands of a third person. "If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier or shipmaster, employed by the consignor or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough; nor is it material, whether the person who is to have the property be a factor or not, for such an agreement may be made with a factor as well as any other individual." (4 Mee. & W. 791).

When goods are shipped for transport by sea, (see 4 Mee & W. 781, 790), the master signs a *bill of lading*, (see 4 Scott, N. R. 43), by which, according to its ordinary form, he undertakes to deliver the goods to the consignee named therein, or his assigns, he or they paying freight, &c. Sometimes a blank is left for the name of the consignee. Several copies or parts of this bill are made, each of which concludes thus: "In witness whereof, I the said master of the said ship have affirmed to three bills of lading of this tenor or date, one of which bills being accomplished, the other two are to be void." The three copies of the bill are delivered to the shipper, who usually keeps one of them, and transmits the others to the consignee, one by the ship itself, and one by the post. The bill of lading is not, however, final or irrevocable; in the absence of any special circumstances and when goods are sent by a general ship, the consignor may change his purpose, at any rate before the delivery of the goods themselves, or of the bill of lading, to the party named in it; and may, by indorsement or otherwise, order the delivery to be made to some other person. (11 Ad. & E. 903). The bill of lading is transferable by blank or special indorsement, and passes the right of property in the goods to any holder who has purchased the bill for good consideration, and bonâ fide, though from a mere factor, broker, or agent of the consignor. The

(19) It was formerly thought that the property in goods to be acquired or created at a future time could not be bound by contract, but the contrary is now settled both at law and in equity. (5 M. & W. 462; 1 Hare, 556; 1 Myl. & K. 488).

it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all

possession of the bill of lading is now made primâ facie evidence of absolute ownership, so that even a pledge of the goods by a factor, who holds the bill of lading, is in general binding on his principal. (Stats. 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39; see 5 Scott, N. R. 1). The consignor has a right to stop the goods in transitu upon the insolvency or bankruptcy of the consignee, and upon other grounds, notwithstanding part payment of the price; but he cannot do so against a bonâ fide assignee for value, without notice of the insolvency, &c., who has taken the bill of lading. (5 T. R. 683; 9 East, 506; 8 M. & W. 431; see 3 Camp. 92).

As to constructive delivery by delivery orders, dock warrants, &c., see 1 J. B. Moore; 2 B. & Cr. 540; 3 Id. 423; 2 Esp. 598; 2 Car. & P. 86; 3 Moo. & Sc. 732; 4 Ad. & El. 58.

Where by special agreement the delivery is to precede the payment of the price, the vendor has no lien for the price, unless, perhaps, where the goods happen to remain in his hands until the time of credit has expired; (1 Gale & D. 1); or unless the vendor becomes insolvent or bankrupt. (4 B. & Cr. 948; 5 B. & Ad. 341; see 8 Mee. & W. 321). Where there is no agreement for credit, the vendor has a lien upon the goods for the price, so long as they remain actually or constructively in his possession. But an actual or constructive delivery, by delivering the goods to an agent for the vendee appointed by him, by giving up the key of the warehouse containing the goods, or by giving a delivery order to the wharfinger or warehouse-keeper, to which he assents, or by delivering part of the goods, without any intention of separating that part from the rest, may put an end to this lien. (Smith Comp. Mercant. Law, 461; 2 Scott, 441; 4 Ad. & E. 58; 12 Id. 632).

The vendor may lose his lien, and yet retain his right to stop the goods in transitu, by notice to the carrier, (7 Taunt. 169; 9 Mee. & W. 518), whether such carrier is appointed by the vendor or vendee, (7 T. R. 440; 7 Scott, 577; see 6 Cl. & Fin. 600), and notwithstanding a previous sale by the consignee to a third person, unless, in certain cases, such sub-sale is accompanied by the bill of lading, delivery order, or other legal document, evincing title to the possession. (5 B. & Ad. 339). "When goods are sold, and nothing is said as to the time of delivery or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded, *upon payment of the price;* but the buyer has no right to the *possession* of the goods till he pays the price. The buyer's right, in respect of the price, is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession. (5 T. R. 215). Whether default in payment, when the credit expires, will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no

commerce between man and man must soon be at an end. And therefore the general rule of law is [c], that all sales and Market overt.

[c] 2 Inst. 713.

bargain for credit, it is not now necessary to inquire, because this is a case of insolvency; and in case of insolvency the point seems to be perfectly clear. (6 East, 614). If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them in transitu. (1 H. Bl. 357; 3 T. R. 464; 7 Id. 440; 1 East, 515; 3 Id. 381). Why? Because the property is vested in the buyer so as to subject him to the risk of any accident, but he has not an indefeasible right to the possession, and his insolvency without payment of the price, defeats that right; and if this be the case after he has dispatched the goods, and while they are in transitu, à fortiori is it when he has never parted with the goods, and when no transitus has begun. The buyer, or those who stand in his place, may still obtain the right of possession, if they will pay or tender the price, or they may still act upon their right of property, if any thing unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property, and right of possession, are both requisite, unless they have both those rights. (7 T. R. 9). Trover is an action of that description, it requires right of property, and right of possession, to support it." (Per Bayley, J.; 4 B, & Cr. 948; see 10 Mee. & W. 436). The criteria of insolvency, for the purpose of founding a right to stop in transitu, are not well settled. Mr. Smith thus states the result of the cases:—"It is remarked that the term *insolvency* (when used with reference to this branch of the law), is satisfied by general inability to pay, evidenced by stoppage of payment. It may be conjectured, from the judgment in *Wilmshurst* v. *Bowker*, (2 M. & Gr. 812; 3 Scott, N.R. 272), that whenever a particular mode of payment has been stipulated for by the contract, which would in its nature precede the delivery of the goods, a default to comply with such stipulation entitles the vendor to withdraw the possession of the goods from the carrier, though the property may have vested. This might of course happen without even a stoppage of payment on the part of the vendees." (Compend. Merc. Law, p. 501, n.).

The vendor's right to stop in transitu ceases of course with the transit, which continues until the goods have reached the destination originally contemplated by the purchaser, unless they have in the mean time come into his actual or constructive possession. If before their arrival he take them out of the carrier's possession, with or without consent, the transit is at an end, although, in the latter case, the carrier might have an action for the wrong. A case of constructive possession is, where the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given by him. (9 M. & W. 534; 2 Id. 622; 8 Id. 431; 10 Id. 436; 5 B. & Ad. 341; 2 Ad. & E. 73; 5 Scott, N. R. 821). The right to stop in transitu cannot be exercised against a bonâ fide purchaser for value of the bill of lading, dock warrant, or other negotiable do-

Sale in market overt.

contracts of any thing vendible, in fairs or markets *overt*, (that is, open), shall not only be good between the parties, but also be binding on all those that have any right of property therein. And for this purpose, the mirroir informs us[d], were tolls established in markets, viz. to testify the making of contracts; for every private contract was discountenanced by law: insomuch, that our Saxon ancestors prohibited the sale of any thing above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses[e]. Market overt in the country is only held on the special days, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day[f]. The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt[g]; but in London every shop in which goods are exposed publickly to sale, is market overt, for such things only as the owner professes to trade in[h 20]. But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and I may take them wherever I find them. And it is expressly provided by statute 1 Jac. I. c. 21, that the sale of any goods wrongfully[21] taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property: for this, being usually a clandestine trade, is therefore made an exception to the general rule. And, even in market overt, if the goods be the property of the king, such sale (though regular in all
[450] other respects) will in no case bind him; though it binds infants, feme coverts, idiots, or lunatics, and men beyond sea or in prison: or if the goods be stolen from a common

[d] C. 1, § 3.
[e] LL. Ethel. 10, 12. LL. Eadg. Wilk. 80.
[f] Cro. Jac. 68.
[g] Godb. 131.
[h] 5 Rep. 83. 12 Mod. 521.

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cument of title to the possession of the goods. (See 5 B. & Al. 817; and the Factors' Acts, 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39).

(20) But the sale must be such a sale as the custom of London authorizes; and, therefore, a sale of stolen goods to a shopkeeper in London, who is not a freeman, is not sufficient to bar the true owner's title. (See Cro. Jac. 68; 3 Per. & D. 178.) And the sale must be of such goods as the keeper of the shop professes to deal in. (Com. Dig., *Market*, (E.); 5 Rep. 83, 11 Ad. & E. 326).

(21) See 5 T. R. 175.

person, and then taken by the king's officer from the felon, and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods[i] [22]. So likewise, if the buyer knoweth the property not to be in the seller; or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound thereby[j]. If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price; unless the property had been previously altered by a former sale[k]. And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice[l]. By which wise regulations the common law has secured the right of the proprietor in personal chattels from being devested, so far as was consistent with that other necessary policy, that purchasers, *bona fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller [24].

[i] Bacon's Use of the Law, 158.
[j] 2 Inst. 713, 714 [23].
[k] Perk. § 93.
[l] 2 Inst. 713.

(22) This subject is now regulated by the stat. 7 & 8 Geo. 4, c. 29, s. 57, which extends the provisions of the 21 Hen. 8, c. 11, to certain takings, which, not being felonies, amount to misdemeanors, and gives the owner, who has prosecuted the offender to conviction, a right to restitution, notwithstanding (as it seems) a sale in market overt. But the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased and sold them again, even with notice of the theft, before the conviction. (2 T. R. 750; see 2 Ad. & E. 499). And a person liable on a security which has been stolen, discharges himself by payment to the holder.

(23) See *Freeman* v. *East India Company*, 5 B. & Al. 624.

(24) Another case, in which the property of the rightful owner may be divested, is, where the subject-matter is money, or a negotiable security. A person who acquires property of this nature for valuable consideration, and without any just cause of suspicion, may retain it against the owner from whom it has been stolen. (1 Bur. 452; 5 B. & Ad. 909, 1098; 1 C., M. & R. 849; 2 Scott, N. R. 96). But no holder can sue under a forged indorsement. (1 You. & C. 394).

Sale of horses.

But there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner, and those are horses[m]. For a purchaser gains no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the directions of the statutes 2 P. & M. c. 7, and 31 Eliz. c. 12. By which it is enacted, that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-
[451] keeper of such fair or market: that toll be paid, if any be due; and if not, one penny to the book-keeper, who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and vendor; the latter being properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate, where the horse shall be found; and, within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bona fide* paid for him in market overt. But in case any one of the points before mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him.

Warranty.

By the civil law[n] an implied warranty was annexed to every sale, in respect to the title of the vendor: and so too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose[o] [25]. But, with regard to the goodness of the wares so purchased, the vendor is not bound to answer; unless he expressly warrants them to be sound and good[p], or unless he knew them to be otherwise and hath used any art

[m] 2 Inst. 719. [n] Ff. 21. 2. 1. [o] Cro. Jac. 474. 1 Roll. Abr. 90. [p] F. N. B. 94.

(25) See Chitty on Contracts, p. 447, contrà.

to disguise them [q], or unless they turn out to be different from what he represented to the buyer [26].

2. Bailment. 2. Bailment, from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee [27]. As if cloth be delivered, or (in our legal dialect) bailed, to a taylor to make a suit of cloaths, he has it upon an implied contract, to render it again when made, and that in a workmanly manner [r]. If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry, them to the person appointed [s]. If a horse, or other goods, be delivered to an inn-keeper or his servants, he is bound to keep them safely, and restore them when his guest [452] leaves the house [t]. If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner [u]. If a pawnbroker receives plate or jewels as a pledge, or security, for the re-payment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time [w 28]:

[q] 2 Roll. Rep. 5.
[r] 1 Vern. 268.
[s] 12 Mod. 482.
[t] Cro. Eliz. 622.
[u] Cro. Car. 271.
[w] Cro. Jac. 245. Yelv. 178.

(26) The vendor impliedly warrants that the thing sold shall answer the purpose for which it is sold; but he is not answerable for a latent defect unknown to himself, and which the purchaser had as good an opportunity of discovering before he accepted the goods, as the seller. (1 Stark. 384; 2 East, 314; see 3 Moo. & P. 155; 2 Scott, N. R. 496). And the proposition requires this further qualification, that, if the contract is for a known article, the implied warranty extends only to the goodness of the article as such, and for the uses to which it is ordinarily put, notwithstanding the vendor may have known that it was bought for a special purpose for which it might not be fit; unless indeed the circumstance that the article was to be used for that purpose was expressly imported into the agreement. (4 Mee. & W. 399; 4 Scott, N. R. 434). As to the distinction between a warranty and a representation, see 1 Smith, Lead. Cas. 77.

(27) And including this essential condition, that the goods are to be redelivered to the owner, or some other person for his benefit, or according to his directions, after the purpose is performed.

(28) Or at any time before they have been sold by the pawnbroker.

for the due execution of which contract many useful regulations are made by statute 30 Geo. II. c. 24[29]. And so if a landlord distreins goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distreinors, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus. If a friend delivers any thing to his friend to keep for him, the receiver is bound to restore it on demand: and it was formerly held that in the mean time he was answerable for any damage or loss it might sustain, whether by accident or otherwise[x]; unless he expressly undertook[y] to keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled[z], that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud: but, if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them, as a prudent man would take of his own[a].

Voluntary bailee.

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his
[453] contract for restitution: the bailor having still left in him the right to a *chose* in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The taylor, the carrier, the inn-keeper, the agisting farmer, the pawnbroker[30],

[x] Co. Litt. 89.

[y] 4 Rep. 84.

[z] Lord Raymond, 909. 12 Modern Rep. 487.

[a] By the laws of Sweden the depositary or bailee of goods is not bound to restitution, in case of accident by fire or theft: provided his own goods perished in the same manner; "*jura enim nostra*," says Stiernhook, "*dolum praesumunt, si unâ non pereant.*" (*De Jure Sueon.* l. 2, c. 5.)

(29) The act now in force is the stat. 39 & 40 Geo. 3, c. 29.

(30) A pawn differs from a mortgage (which by special contract may be made even of a personal chattel), and also from a lien, which confers no right of sale or appropriation. On breach of the condition, the thing mortgaged becomes at law the absolute property of the mortgagee; but in case of a pawn, non-payment at the time only authorizes the pawnee to sell; and so long as the chattel remains in his hands

the distreinor, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person [b]. For, being responsible to the bailor, if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them; that he may always be ready to answer the call of the bailor [31].

[b] 13 Rep. 69.

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unsold, the debtor may re-entitle himself by payment or tender of the debt. (2 Str. 919; 1 P. Wms. 261; 1 Salk. 522; Com. Dig., *Mortgage*). The pawnee is bound to keep the pledge with ordinary care; and if he does this, he may recover the debt, notwithstanding the loss of the pledge. (Id). And as the security is collateral to the debt, he may commence an action for the debt without giving up the pledge. (Bac. Ab., *Bailment*, (B.)).

In addition to these common-law liabilities, pawnbrokers are regulated in their dealings by the 39 & 40 Geo. 3, c. 99, which fixes the rate of interest to be taken by them, and prescribes the mode of disposing of the bailments when not claimed within the year, and the means to facilitate the detection of stolen property which may be offered to them in pledge. A pawnbroker has no right to sell property pledged after the expiration of a year from the time it was pledged, after the original owner has tendered to him the principal and interest due; the intention of the act being that the pawnbroker *may* sell then to reimburse himself, and not, by the words "shall be deemed forfeited," to vest the whole property in him. (5 B. & Al. 439; 1 D. & Ry. 1). The taking more interest than the statute allows is an offence cognizable by a magistrate. (12 East, 673). The statute provides, that, upon the sale of property above the value of ten shillings, according to the act, the surplus beyond principal, profit, and reasonable expenses of the sale, shall be paid to the pawner or his legal representative, upon being claimed at any time within three years. See further, stat. 1 Jac. 1, c. 21.

(31) There are two celebrated classifications of the various kinds of bailments—that of Lord Holt, in the case of *Coggs* v. *Bernard*, (Lord Raym. 909; 1 Smith, Lead. Cas. 77), and that of Sir W. Jones. Lord Holt's was thus expressed: "There are six sorts of bailments:—The first sort of bailment is a bare naked bailment of goods, delivered by one man to another, to keep for the use of the bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in *Southcote's case*, (4 Rep. 83). The second sort is when goods or chattels that are useful are lent to a friend gratis, to be used by him, and this is called *commodatum*, because the thing is to be restored in specie. The third sort is when goods are left with the bailee, to be used by him for hire, this is called *locatio et conductio*, and the lender is called the *locator*, and the borrower, *conductor*. The fourth sort is when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor, and this is called in Latin *vadium*, and in English, a pawn, or a pledge. The fifth sort is when the goods or chattels are delivered to be

3. Hiring and borrowing.

3. Hiring and *borrowing* are also contracts by which a qualified property may be transferred to the hirer or bor-

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carried, or something is to be done about them for a reward, to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage." The fifth sort of bailment, mentioned by Lord Holt, is called *locatio operis faciendi*, and the sixth *mandatum*.

Upon this judgment of Lord Holt, Sir W. Jones has these remarks:—"His division of bailments into six sorts appears in the first place a little inaccurate; for in fact his fifth sort is no more than a branch of his third, and he might with equal reason have added a seventh, since the fifth is capable of another subdivision. I acknowledge, therefore, but five species of bailment, which I shall now enumerate and define, with all the Latin names, one or two of which Lord Holt has omitted:—1. *Depositum*, which is a naked bailment, without reward, of goods to be *kept* for the bailor. 2. *Mandatum* or *commission*, when the mandatory undertakes without recompense to do *some act* about the things bailed, or simply to *carry* them; and hence Sir H. Finch divides bailment into *two* sorts, to *keep* and to *employ*. 3. *Commodatum*, or *loan for use*, when goods are bailed without pay, to be *used* for a certain time by the bailee. 4. *Pignori acceptum*, when a thing is bailed by a debtor to his creditor in *pledge*, or as a security for the debt. 5. *Locatum*, or *hiring*, which is always for a *reward*, and this bailment is either: 1, *Locatio rei*, by which the hirer gains the temporary use of *the thing*; or 2, *Locatio operis faciendi*, when *work* and *labour*, or *care* and *pains*, are to be performed or bestowed on the thing delivered; or 3, *Locatio operis mercium vehendarum*, when goods are bailed, for the purpose of being *carried* from place to place, either to a *public* carrier, or to a *private* person." Dr. Story makes a separate subdivision, under the head of hiring, of *locatio custodiæ*, which Sir W. Jones refers to the general title of *locatio operis faciendi*. I am unable to guess at the analogy which could have led Sir W. Jones to confuse locatio operis with locatio rei, and to rank Lord Holt's fifth sort of bailment as a branch of his third.

The difference between the first and sixth classes, it will be observed, is merely, that, in the one, the bailee's care extends only to the keeping of the goods, while, in the other, he carries or performs some work upon them. If there were any real distinction, for the purposes of arrangement, between the care bestowed in keeping and watching, and the care bestowed in carrying or working upon goods, the fifth class, which includes bailments with reward for custody, as well as for carrriage or for manipulation, should have been divided into two. But the arrangement may be better amended by uniting the first and sixth kinds; and then (setting aside the case of a pawn, which is peculiar, and involves a contingent dereliction of ownership) we have four kinds of bailment, reducible to two general heads, viz. 1. Bailment of goods to be kept, carried, or manufactured with or without reward. 2. Hiring of goods, with or without payment.

There are two considerations of importance with respect to a bailee, which should not be passed over: his *liability* for loss or injury to the thing bailed; and his *lien* for the recompense for his labour bestowed upon it.

The liability of the bailee for losses and injuries depends upon the nature

rower: in which there is only this difference, that hiring is always for a price, a stipend, or additional recompense; bor-

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of the contract of bailment, and the amount of care which might have prevented the injury. The result of the cases is thus stated by Mr. Smith:—"Bailees may be divided into three general classes, varying from one another in their degrees of responsibility. The first of these is when the bailment is for the benefit of the bailor alone; this includes the cases of mandatories and deposits, and in this the bailee is liable only for *gross negligence*. (See 11 Mee. & W. 113). The second is where the bailment is for the benefit of the bailee alone; this comprises loans, and in this class the bailee is bound to the very *strictest diligence*. The third is where the bailment is for the benefit both of bailor and bailee; this includes locatio rei, vadium, and locatio operis; and in this class an ordinary and average degree of diligence is sufficient to exempt the bailee from responsibility." (1 Lead. Cas. 104; 4 Nev. & M. 170; 1 H. Bl. 158; 8 Mee. & W. 258; 3 Scott, N. R. 1). All bailees become responsible for loss by casualty or violence after their *refusal* to return the goods bailed, upon a lawful demand. (Noy's Max. 215; Jones on Bailments, 42, 120). The liabilities of innkeepers and carriers rest on peculiar grounds, and deserve more particular notice.

An *innkeeper's* liability is not so extensive as that of a carrier, nor is he regarded, as a carrier is, in the light of a surety. He is bound to keep safely all such things as his guests deposit in his custody, or within his inn; and all losses, except those arising from irresistible force, the act of God, or the king's enemies, are primâ facie presumed to arise from the negligence of himself or his servants. He may excuse himself by shewing, if he can, that he and his servants were guilty of no negligence, and that the loss was the result of inevitable accident or superior force, or arose from the guest's own default, as that the robbery was committed by the guest's own servant or companion; but the plea of sickness or even insanity at the time, will not avail him; nor is the guest's mere negligence any excuse. (Jeremy, 145; Cro. Eliz. 622; 3 B. & Al. 283; 8 B. & Cr. 9; see 7 Jurist, 1038). He cannot discharge himself from responsibility by *refusing* to take charge of the goods, because there are suspected persons in the house, whose conduct he cannot control. (Jones, 95; 5 T. R. 273; 8 Coke, 32). If he refuse because his house is full of parcels, he is still liable for a loss, if the goods are deposited there, though he is not informed of it, provided the owner remains as a guest. (8 Rep. 63; 5 T. R. 273). When the guest quits the inn, the goods, if left, become a simple deposit, gratuitous or for hire, as the case may be. But if the guest obtain exclusive use of a room for the purposes of a shop or warehouse, his conduct may exonerate the innkeeper as to the property therein. (Holt, 209, 211, n.; 1 Stark. 249; see also 4 Mau. & S. 306; 4 Dowl. & Ry. 636; 2 Barn. & Adol. 803; 1 Adol. El. 533).

The 6 Ann. c. 31, and 14 Geo. 3, c. 78, seem to exonerate bailees generally from liability for losses occasioned by fire beginning in any *house* or *chamber:* the latter act extends to barns, stables, or other buildings, on any person's estate, within the bills of mortality; but it seems that innkeepers and carriers are not within the protection of this statute. (4 T. R. 581; 5 T. R. 389; 1 Stark. 72).

Special carriers, who do not undertake to carry for all persons indiscriminately, have no greater liabilities than other bailees for hire. *Common*

rowing is merely gratuitous. But the law in both cases is the same[32]. They are both contracts, whereby the posses-

carriers are those who undertake to carry for all persons indifferently, (see 8 Car. & P. 207), and they are bound to do so for reasonable hire and reward. (2 Show, 81, 129; 1 B. & Al. 32; 4 Mee. & W. 749; 8 Id. 443; 10 Id. 161).

A common carrier is not merely answerable as a bailee for the consequences of his own negligence, but has a further liability in the character of an *insurer* against accidents and losses, however inevitable, that do not arise from the act of the Queen's enemies, or of God, such as tempests, &c.; and even for losses arising from such causes as these latter, if he voluntarily encounters the mischief. (1 T. R. 27; 5 Id. 389; 1 Per. & D. 4). Carriers were in the habit of endeavouring to limit their liabilities in this respect, by notices to the effect that they would not be accountable for property beyond a certain value, unless the value was declared, and an insurance was paid; and wherever it could be proved that these notices had come to the knowledge of their employers, they were allowed the benefit of the contract implied from such knowledge; (6 B. & Cr. 601; see 12 Moore, 447); and remained answerable only for the consequences of their *gross* negligence. (2 B. & Al. 356; 5 Id. 53; see 4 Id. 21; 2 Moo. & P. 319, 331; see 8 Mee. & W. 228; 10 Id. 161). The Land Carriers Act, (11 Geo. 4 & 1 Will. 4, c. 68), deprives these general notices of effect, but provides that carriers, who affix in some public and conspicuous part of their offices a notice in the form prescribed by the act, shall not be answerable for the loss or damage of gold, silver, jewellery, silks, stamps, bank-notes, title-deeds, pictures, and other valuable goods, specified in the act, contained in any parcel to the value of more than 10*l.*, unless the value and notice of the articles shall have been declared at the time of delivery, and an insurance paid or agreed to be paid. It is provided that the act shall not exonerate carriers from the liability for losses arising from the felonious acts of their servants. It was thought that this act was intended to relieve carriers from their peculiar liabilities as insurers only; and that they would still be liable for the loss of any goods specified by the act, the value of which had not been declared, if such loss arose from their own *gross neglect;* (2 Cr. & M. 353); but this opinion has been overruled. (2 Gale & D. 36; see 8 Mee. & W. 443).

Carriers by water are still allowed to protect themselves by general notices, (provided they come to the knowledge of the parties to be bound), and are further protected from particular liabilities by the stats. 7 Geo. 2, c. 15; 26 Geo. 3, c. 86; 53 Geo. 3, c. 159; and 6 Geo. 4, c. 125, s. 86. (See 2 B.& Al. 2. Vide infra, vol. 3, p. 165, n.).

Most bailees for reward have a lien upon or right of detaining the thing bailed, until they have received their remuneration, with this obvious exception, that the nature of the bailment be not such as necessarily to preclude the bailee from claiming the uninterrupted possession of the chattel, as in the case of a horse-trainer. (5 Mee.

(32) This error is corrected by Sir W. Jones, who concludes, that the hirer of a thing is answerable only for ordinary neglect; but that a gratuitous borrower is responsible even for slight negligence. (p. 120).

sion and a transient property is transferred for a particular time or use, on condition to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation and not abuse it; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward. Thus if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period; on the expiration of which his qualified property determines, and the owner becomes (in case of hiring) entitled also to the price, for which the horse was hired [c].

[454]

Of interest on money.

There is one species of this price or reward, the most usual of any, but concerning which many good and learned men have in former times very much perplexed themselves and other people, by raising doubts about its legality *in foro conscientiae*. That is, when money is lent on a contract to receive not only the principal sum again, but also an increase

[c] Yelv. 172. Cro. Jac. 236.

& W. 350). The common-law right of lien arises in three cases: first, where the bailee has bestowed labour or expense to alter or improve the chattel; (5 Mau. & S. 180; 2 Cr. & M. 304; 5 Mee. & W. 342); secondly, where the bailee was compellable to receive the chattel, as in case of a carrier or innkeeper; (Bac. Ab., *Inn*, (D.); 2 B. & Al. 283); lastly, where the party in possession has saved the chattel from peril by sea, or has recovered it after actual loss at sea, or capture by an enemy; in which case he may retain it until he is remunerated for the salvage. (Ld. Raym. 393; 8 East, 57). A lien is special, *i. e.* confined to the particular demand which arises in respect of the thing detained, unless extended by special agreement or the usage of the particular business, into a *general* lien, for the entire balance due in respect of the mutual dealings of the parties in that business. This general lien has been allowed in the case of a factor, (4 B. & Al. 27; and see stat. 6 Geo. 4, c. 94), wharfinger, (M'Clel. & Y. 173), packer, (1 Atk. 228), calico printer, (3 Esp. 268), insurance broker, (2 East, 523), banker, (15 East, 428; 2 Scott, N. R. 96), attorney, (Doug. 104, 238; 4 Taunt. 807; 2 Hare, 177), stereotype printer. (Mood & M. 465). But carriers are not entitled to such a general lien, and the courts do not encourage usages of this nature. (7 East, 229; see 7 B. & Cr. 212). The lien of an innkeeper is necessarily general. (7 Car. & P. 67; see 3 Mee. & W. 248).

by way of compensation for the use; which generally is called *interest* by those who think it lawful, and *usury* by those who do not so. For the enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is said to be laid down by Aristotle [d], that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of its institution, which was only to serve the purposes of exchange, and not of increase. Hence, the school divines have branded the practice of taking interest, as being contrary to the divine law both natural and revealed; and the canon law [e] has proscribed the taking any, the least, increase for the loan of money as a mortal sin.

But, in answer to this, it hath been observed, that the Mosaical precept was clearly a political, and not a moral precept. It only prohibited the Jews from taking usury from their brethren the Jews; but in express words permitted them to take it of a stranger [f]: which proves that the taking of moderate usury, or a reward for the use, for so the word signifies, is not *malum in se;* since it was allowed where any but an Israelite was concerned. And as to the reason supposed to be given by Aristotle, and deduced from the natural barrenness of money, the same may with equal force be alleged of houses, which never breed houses; and twenty other things, which nobody doubts it is lawful to make profit of, by letting them to hire. And though money was originally used only for the purposes of
[455] exchange, yet the laws of any state may be well justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end for which money was invented) shall require it. And that the allowance of moderate interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowledged principle, that commerce cannot subsist without mutual and extensive credit. Unless money there-

[d] Polit. l. 1, c. 10. This passage hath been suspected to be spurious.

[e] Decretal. l. 5, tit. 19.

[f] Deut. xxiii. 20.

fore can be borrowed, trade cannot be carried on: and if no premium were allowed for the hire of money, few persons would care to lend it; or at least the ease of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb, and fell entirely into the hands of the Jews and Lombards: but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit; and again introduced with itself its inseparable companion, the doctrine of loans upon interest. And, as to any scruples of conscience, since all other conveniences of life may either be bought or hired, but money can only be hired, there seems to be no greater oppression in taking a recompense or price for the hire of this, than of any other convenience. To demand an exorbitant price is equally contrary to conscience, for the loan of a horse, or the loan of a sum of money: but a reasonable equivalent for the temporary inconvenience, which the owner may feel by the want of it, and for the hazard of his losing it entirely, is not more immoral in one case than it is in the other. Indeed the absolute prohibition of lending upon any, even moderate interest, introduces the very inconvenience which it seems meant to remedy. The necessity of individuals will make borrowing unavoidable. Without some profit allowed by law, there will be but few lenders: and those principally bad men, who will break through the law, and take a profit; and then will endeavour to indemnify themselves from the danger of the penalty, by making that profit exorbitant. A capital distinction must, therefore, be made between a [456] moderate and exorbitant profit; to the former of which we usually give the name of interest, to the latter the truly odious appellation of usury; the former is necessary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated society. For, as the whole of this matter is well summed up by Grotius[g], "if the compensation allowed by law does not "exceed the proportion of the hazard run, or the want felt, "by the loan, its allowance is neither repugnant to the re-

[g] De J. B. & P. l. 2, c. 12, § 22.

"vealed nor the natural law: but if it exceeds those bounds, "it is then oppressive usury; and though the municipal "laws may give it impunity, they never can make it just [33]."

(33) The opinion of the legislature in the reign of Queen Anne on this subject, is thus expressed in the preamble to the Statute against Usury, (12 Anne, st. 2, c. 16, A.D. 1713): "Whereas the reducing of interest to ten, and from thence to eight, and thence to six in the hundred, hath from time to time by experience been found very beneficial to the advancement of trade and improvement of lands; and whereas the heavy burden of the late long and expensive war hath been chiefly borne by the owners of the land of this kingdom, by reason whereof they have been necessitated to contract very large debts, and thereby and by the abatement in the value of their lands are become greatly impoverished; and whereas by reason of the great interest and profit which hath been made of money at home, the foreign trade of this nation hath of late years been much neglected, and at this time there is a great abatement in the value of the merchandizes, wares, and commodities of this kingdom, both at home and in foreign parts whither they are transported; and whereas for the redress of these mischiefs, and the preventing the increase of the same, it is absolutely necessary to reduce the high rate of interest of six pounds in the hundred pounds for a year, to a nearer proportion with the interest allowed for money in foreign states:"—A curious tissue of contradictions.

The habits of thought current in our author's days, or rather in the age immediately preceding his own, prevented his seeing what is now obvious as soon as stated, that laws intended to control the rate of remuneration paid for the *use* of money, (as distinguished from that which is paid as insurance against the *risk* of losing the capital), must be either mischievous or inoperative; because the lowest value for the time being of money, or of the use of money, like that of every other commodity which is not monopolised, is ascertained with the utmost exactness, by means of competition among those who desire to lend, and with more exactness than is attainable in respect of most commodities, on account of the absolute sameness in the *quality* of this particular commodity; while, on the other hand, laws intended to control the rate of insurance against risk must necessarily be both inoperative in the way intended, and mischievous,—inoperative, because no rule of law can so change the habits or characters of individuals, but that improvidence, if its development in one direction is checked, will certainly break forth and expend itself in some other way; and mischievous, because to the intrinsic risk of every transaction that comes within its operation, it unnecessarily and cruelly adds one of its own creation, namely, the risk of incurring the penalties which it imposes. In addition to this, the legislature is chargeable with the monstrous presumption and absurdity of pretending to know better than individuals, what bargains and what terms are most advantageous for them.

"A man is in one of those situations, suppose, in which it would be for his advantage to borrow, but his circumstances are such that it would not be worth anybody's while to lend him at the highest rate which it is proposed the law should allow,—in short, he cannot get it at that rate. If he thought he *could* get it at that rate, most assuredly he would not give a higher; he may be trusted for that, for, by the supposition, he has nothing defective in his understanding. But the fact is, he cannot get it at that

We see, that the exorbitance or moderation of interest, for money lent, depends upon two circumstances: the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the rate, therefore, of general interest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom: for, the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry on the business of exchange and the common concerns of life. In every nation or public community, there is a certain quantity of money thus necessary; which a person well skilled in political arithmetic might perhaps calculate as exactly, as a private banker can the demand for running cash in his own shop: all above this necessary quantity may be spared, or lent, without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be the lenders, and the lower ought the rate of the national interest to be: but, where there is not enough circulating cash, or barely enough, to answer the ordinary uses of the public, interest will be proportionably high; for lenders will be but few, as few can submit to the inconvenience of lending.

So also the hazard of an entire loss has its weight in the [457]
regulation of interest: hence, the better the security, the lower will the interest be; the rate of interest being generally in a compound *ratio*, formed out of the inconvenience, and the hazard. And as, if there were no inconvenience, there should be no interest but what is equivalent to the hazard, so, if there were no hazard, there ought to be no interest, save only what arises from the mere inconvenience

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lower rate. At a higher rate, however, he could get it; and at that rate, though higher, it would be worth his while to get it; so he judges, who has nothing to hinder him from judging right—who has every motive and every means for forming a right judgment—who has every motive and every means for informing himself of the circumstances, upon which rectitude of judgment in the case in question depends. The legislator who knows nothing, nor can know anything of any one of all these circumstances, comes and says to him, 'It signifies nothing. You shall not have the money, for it would be doing you a mischief to let you borrow it upon such terms.'" Bentham, Defence of Usury, Letter IV.

of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to *three per cent.*: a man that has money by him will perhaps lend it upon good personal security at *five per cent.*, allowing two for the hazard run; he will lend it upon landed security or mortgage at *four per cent.*, the hazard being proportionably less; but he will lend it to the state, on the maintenance of which all his property depends, at *three per cent.*, the hazard being none at all.

But sometimes the hazard may be greater than the rate of interest allowed by law will compensate. And this gives rise to the practice of, 1. Bottomry, or *respondentia.* 2. Policies of insurance. 3. Annuities upon lives.

Bottomry.

And first, *bottomry* (which originally arose from permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit) is in the nature of a mortgage of a ship; when the owner[34] takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship (*partem pro toto*) as a security for the re-payment. In which case, it is understood, that[35], if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender[h]. And in this case the ship and tackle, if brought home[36], are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who therefore in

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Respondentia.

[h] Moll. de Jur. Mar. 361. Malyne, Lex Mercat. b. 1, c. 31. Bacon's Essays, c. 41. Cro. Jac. 208. Bynkersh. Quaest. Jur. Privat. l. 3, c. 16.

(34) As to the authority of the master to hypothecate the ship or cargo at a foreign port, see 5 Str. 692; 3 Rob. 240; 4 Id. 245; 1 E. F. Moore, Privy Council Cases, 5; and Abbott on Shipping.

(35) See, as to the construction of these contracts, 3 B. & Ad. 50; 4 East, 319.

(36) See 1 Mau. & S. 31; 16 East, 214; 3 Doug. 164.

this case is said to take up money at *respondentia*. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; when a man lends a merchant 1,000*l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed[i]: which kind of agreement is sometimes called *foenus nauticum*, and sometimes *usura maritima*[j]. But, as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the statute 19 Geo. II. c. 37, that all monies lent on bottomry or at *respondentia*, on vessels[37] bound to or from the East Indies, shall be expressly lent only upon the ship or upon the merchandize; that the lender shall have the benefit of salvage[k]; and that if the borrower hath not an interest in the ship, or in the effects on board, equal to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest and all other charges, though the ship and merchandize be totally lost[38].

Fœnus nauticum, or usura maritima.

Secondly, a policy[39] of *insurance* is a contract between A. and B., that upon A.'s paying a premium equivalent to the

Insurance.

[i] 1 Sid. 27. [j] Molloy, de Jur. Mar. 361. Malyne, Lex Mercat. b., c. 31.
[k] See Vol. I. page 294.

(37) "Belonging to his Majesty's subjects." (See 7 Geo. 1, c. 21).

(38) The general nature of a *respondentia* bond is this: the borrower binds himself in a large penal sum, upon condition that the obligation shall be void, if he pay the lender the sum borrowed and so much a month from the date of the bond till the ship arrives at a certain port, or if the ship be lost or captured in the course of the voyage. The respondentia interest is frequently at the rate of forty or fifty per cent., or in proportion to the risk and profit of the voyage. The respondentia lender may insure his interest in the success of the voyage, but it must be expressly specified in the policy to be respondentia interest; (3 Burr. 1391); unless there is a particular usage to the contrary. (Park, Ins. 11). A lender upon respondentia is not obliged to pay salvage or average losses; [as to this see 2 Marsh. Insur. 715]; but he is entitled to receive the whole sum advanced, provided the ship and cargo arrive at the port of destination; nor will he lose the benefit of the bond, if an accident happens by the default of the borrower or the captain of the ship. (Ib. 421).—[CHRISTIAN]. Nor will a *temporary* capture, or any damage short of the destruction of the ship, defeat his claim. (2 Park, 626; 1 Mau. & S. 30).

(39) Policy of insurance, *police d'assurance*, from polliceri, to promise. So, a bill of lading is called in French *police de chargement*.

hazard run, B. will indemnify or insure him against a particular event. This is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For, if I insure a ship to the Levant, and back again, at *five per cent.*; here I calculate the chance that she performs her voyage, to be twenty to one against her being lost: and, if she be lost, I lose 100*l.* and get 5*l.* Now, this is much the same as if I lend the merchant, whose whole fortunes are embarked in this vessel,
[459] 100*l.* at the rate of *eight per cent.* For, by a loan I should be immediately out of possession of my money, the inconvenience of which we have supposed equal to *three per cent.*: if, therefore, I had actually lent him 100*l.* I must have added 3*l.* on the score of inconvenience, to the 5*l.* allowed for the hazard, which together would have made 8*l.* But, as upon an insurance, I am never out of possession of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus too, in a loan, if the chance of re-payment depends upon the borrower's life, it is frequent (besides the usual rate of interest) for the borrower to have his life insured till the time of re-payment; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year; the inconvenience and general hazard of this loan, we have seen, are equivalent to 5*l.*, which is, therefore, the legal interest: but there is also a special hazard in this case; for if Sempronius dies within the year, Titius must lose the whole of his 100*l.* Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth 10*l.* more, and, therefore, that the reasonable rate of interest in this case would be *fifteen per cent.* But this the law, to avoid abuses, will not permit to be taken: Sempronius, therefore, gives Titius, the lender, only 5*l.*, the legal interest; but applies to Gaius, an insurer, and gives him the other 10*l.* to indemnify Titius against the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided against, which the established rate of interest will not reach; that being calculated by the state to answer only the ordinary and general hazard, together with the lender's incon-

Life insurance.

venience in parting with his specie for the time. But, in order to prevent these insurances from being turned into a mischievous kind of gaming, it is enacted by statute 14 Geo. III. c. 48, that no insurance shall be made on lives, or on any other event, wherein the party insured hath no interest; that in all policies the name of such interested party shall be inserted; and nothing more shall be recovered thereon than the amount of the interest of the insured [40]. Stat. 14 Geo. 3, c. 48. [460]

This does not, however, extend to marine insurances, which were provided for by a prior law of their own. The learning relating to these insurances hath, of late years, been greatly improved by a series of judicial decisions; which have now established the law in such a variety of cases, that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence: but, being founded on equitable principles, which chiefly result from the special circumstances of the case, it is not easy to reduce them to any general heads in mere elementary institutes [41]. Thus much, however, may be said; that, being contracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment [42]: and, on Marine insurance.

(40) As to what wagers are prohibited by the statute, see Cowp. 729, 737; 3 T. R. 693; 4 Scott, 230. It has been decided that a father has not an insurable interest in the life of his child; but it seems a wife has such an interest in that of her husband. (10 B. & Cr. 725; Peake, Add. C. 70). Every individual has an interest in his own life; and if a policy of insurance is effected by a debtor on his own life, and assigned to his creditors as a security, it will remain valid, after satisfaction of the debt, for the benefit of the debtor. (See 1 Madd. 573). But a creditor has an insurable interest in the life of his debtor only during the existence of the debt; and it has been decided, upon the unsatisfactory ground that the contract of insurance is a mere contract of indemnity, that a policy effected by the creditor fails when the debt is discharged. (9 East, 71; see 1 Ll. & G., Cas. tem. Sugd. 291; Cas. tem. Plunk. 322). But if the premium paid by the creditor were charged by him to the debtor, it would be different. (Id.; 6 Esp. 11). And a policy effected by any person on his own life is good in the hands of his assignee for value. (3 Sim. 149).

(41) This task was accomplished by Mr. Justice Park, in his masterly treatise on the subject, which was followed by Mr. Serjeant Marshall's excellent work; and see 2 Saund. 200, and Smith's Mercantile Law, Book 3, ch. 4.

(42) Thus it is an essential implied condition, that the vessel be seaworthy. (5 Mee. & W. 414; 7 Ad. & E. 390; see 3 Taunt. 299). And any material concealment will vitiate a policy. (4 Br. P. C. 482; 10 B. & Cr. 527). There is a distinction be-

the other hand, being much for the benefit and extension of trade, by distributing the loss or gain among a number of

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tween a *representation* and a *warranty*, the latter being a condition or contingency inserted in the policy itself; thus, where a ship is warranted to sail on a particular day, and she sails either before or after, though for the best reason, the assurer is discharged; (1 T. R. 345; Cowp. 606, 607; see 3 Mau. & S. 461; 1 Marsh. 570); but it is enough that a representation be substantially performed. (Cowp. 785). Negligence of the crew at the time of the loss is no breach of the implied warranty, if the crew be sufficient at the outset. (2 B. & Al. 73). A *voluntary* and unnecessary deviation, even for a night or an hour, from the voyage, discharges the assurer from the policy; (Park, 298; 3 Taunt. 16; 4 Taunt. 229; 3 Camp. 437; 16 East, 312; Selw. N. P. 978; 4 Moore, 150; 5 B. & Al. 45; 4 Ad. & E. 241; 3 Mee. & W. 49); but "a vessel, when insured, may always do whatever it would be expedient to do if uninsured." (Per Gibbs, C. J., Holt, 186).

The underwriter is not answerable for any loss happening (though in consequence of an act done in the voyage) after the ship has been twenty-four hours in port in good safety; (Park, 35); but if the policy be, "until the ship shall have ended and be discharged of her voyage," and not, "until she shall have moored at anchor twenty-four hours in good safety," it has been holden that the policy is not discharged till she is unloaded. (Skin. 243; see 1 Ad. & E. 29). The presumption as to the loss of a missing ship, will be governed by the circumstances laid before the jury. (Holt, 244; 2 Camp. 85; 6 B. & Cr. 19). If after payment on such a presumption the vessel reappear, she will belong to the underwriters. (Holt, 242). The insurance may be expressed to hold good, whether the ship is lost or not lost at the time of effecting it, and this is usually done in this country. (3 Ad. & E. 303; see 11 Mee. & W. 296).

The dangers usually insured against are, "of the seas, men of war, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, taking at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes." As to what perils are comprised in the general words, "other perils," see 3 Taunt. 227; 5 B. & Al. 161; 5 Mau. & S. 461; 4 Camp. 203; 1 Scott, 491. Loss from damage by worms or rats is not "by peril" of the sea. (Park, 105). Jettison is a voluntary throwing overboard of goods in case of distress, or to save them from capture. (3 B. & Al. 398).

Barratry comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured. (Cowp. 155, 156; 1 T. R. 159; 4 T. R. 33; 5 B. & Cr. 212).

It is a general principle that the insured shall recover, in case of loss, no more than an indemnity; but mercantile usage mayentit le him to the whole which would be payable to him on a safe arrival, without deducting tonnage duty, pilotage, &c. (1 Bingh. 61). If the voyage is lost, though the property is safe, the owner may abandon; or if the salvage is high, the expense of pursuing the voyage great, and the assurer will not bear it: (1 T. R. 615; 2 Burr. 1209): but he cannot elect to abandon or not till he hears of the loss, nor after he hears the peril is over and the ship is in safety. (2 Burr. 1211; see 2 Saund. 200).—[CHITTY.]

By the terms of the policy, the underwriters are usually made liable for *salvage* and for *general average*.

adventurers [43], they are greatly encouraged and protected

Average (originally the proportion of cattle-labour due from each tenant to his lord, from *averare*, to carry or draw, and afterwards used to signify the proportion paid by each merchant for his goods carried; Cowell) is a contribution by the owners of the ship, freight, and goods on board, in proportion to their respective interests, towards any particular loss or expense sustained for the general safety of the ship and cargo, in order that the particular sufferer may not in the end be a greater loser than the rest of the persons interested. Thus, in the case of jettison, or of cutting away the masts, &c., in a storm, or where salvage is paid to recaptors, or money or goods given as a compensation to pirates to save the rest, or where a ransom (when that was legal, see 22 Geo. 3, c. 25; 43 Geo. 3, c. 160; 45 Geo. 3, c. 72) was agreed to be paid to an enemy or pirate for liberating the ship, or an expense is incurred in reclaiming her, or defending a suit in a foreign court of admiralty, and obtaining her discharge from an unjust capture or detention:—in these and the like cases, where any sacrifice is deliberately and voluntarily made, or any expense fairly and bonâ fide incurred to prevent a total loss, or some great disaster, such sacrifice or expense is the proper subject of a general contribution, and ought to be rateably borne by the owners of the ship, freight, and cargo, so that the loss may fall equally upon all, according to the equitable maxim of the civil law, *nemo debet locupletari aliend jacturâ*. The application of this principle was understood by the Rhodians, whose regulations on this subject were adopted into the Roman law, and made an important head in the Digest, under the title *De lege Rhodi de jactu*. (Marshall, Insur. 539). The claim to general average does not arise, unless the loss was voluntarily incurred by those on board, or having the conduct of the business, and tended to, and was actually followed by, the preservation of the rest, or of some part of the ship and cargo. (Id.; see 5 Mee. & W. 569). As to deck cargo, see 2 Gale & D. 142. *Petty* or *accustomed* averages are such small charges as pilotage, towage, light money, beaconage, anchorage, bridge-toll, quarantine, river charges, signals, instructions, castle money, &c., which, when they are incurred in the ordinary course of the voyage, are regarded as necessary and ordinary expenses, and not as a loss within the terms of the policy; but if incurred for any extraordinary purpose in the voyage, as to provide against any impending danger, or in consequence of the ship's being driven out of her course by stress of weather, are deemed gross or general average, for which the insurer will be liable. (Marshall, 539). As to what is *particular average*, see 4 Ad. & E. 420.

A re-assurance is the contract which an insurer, who wishes to be indemnified against the risk he has taken upon himself, makes with another person, by giving him a premium to re-assure to him the same event, which he himself

(43) As to the mode in which assurances are transacted, through the medium of brokers, see 4 Mee. & W. 211, and 6 Man. & S. 289. The policy must contain the name or names of one or more of the persons interested, or of the consignor or consignee of the property, or of the person or persons residing in Great Britain, who shall receive the order for and effect the insurance, or of the person or persons who shall give the order to the agent immediately employed to effect it. (Stat. 28 Geo. 3, c. 56; 1 Bos. & P. 316, 345).

both by common law and acts of parliament [44]. But, as a practice had obtained of insuring large sums without having any property on board, which were called insurances, *interest or no interest,* and also of insuring the same goods several times over; both of which were a species of gaming, without any advantage to commerce, and were denominated *wagering* policies: it is, therefore, enacted by the stat. 19 Geo. II. c. 37, that all insurances, interest or no interest, or without farther proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer (all which had the same pernicious tendency), shall be totally null and void, except upon privateers, or upon ships or merchandize from the Spanish and Portuguese dominions, for reasons sufficiently obvious; and that no re-assurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead: and lastly, that, in the East India trade, the lender of money on bottomry, or at *respondentia,* shall alone have a right to be insured for the money lent, and the borrower shall (in case of a loss) recover no

Interest or no interest, and wagering policies.

Stat. 19 Geo. 2, c. 37.

Re-assurance.

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has insured. Re-assurances are prohibited by the statute 19 Geo. 2, c. 37, both upon foreign and English ships, unless the assurer is insolvent, a bankrupt, or dead; in which cases he, his assignee, or personal representative, may make a re-assurance, which must be expressly mentioned as a re-assurance in the policy. (2 T. R. 161). The object of prohibiting re-assurance was, to prevent idle gaming speculations, by persons endeavouring to obtain a high premium for insurance, and then to secure themselves by getting the same risk insured at a lower rate. The learned judge seems to have mistaken a double assurance for a re-assurance; a double insurance is where the owner insures his goods twice or *several times over,* with different underwriters, which he may lawfully do. By which means he increases his security, and, though he cannot recover more than a single satisfaction for his loss, yet he may bring his action against any one of the underwriters, and compel him to pay the whole extent of the interest insured. And this underwriter may afterwards recover from each of the rest a rateable satisfaction or apportionment of the sum which he has been obliged to pay to the assured. (Park, 280).—[CHRISTIAN.]

(44) A special court for deciding questions on policies of insurance was erected by the statute 43 Eliz. c. 12, which fell into disuse, probably on account of its defective jurisdiction; it having been decided, that a judgment for the defendant did not protect him from a subsequent action for the same cause. (2 Sid. 121).

Another parliamentary interference with this matter, was the granting of a monopoly of insuring, as against other *companies,* to the Royal Exchange and the London Assurance Companies, by the statute 6 Geo. 1, c. 18, which has been repealed by the 5 Geo. 4, c. 114; and marine assurances are now largely effected with public companies.

more upon any insurance than the surplus of his property, above the value of his bottomry, or *respondentia* bond[45].

Annuities for lives.

Thirdly, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates (in effect) to repay annually, during his life, some part of the money borrowed; together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that principal entirely by the contingency of the borrower's death[46]: all which considerations, being calculated and blended together, will constitute the just proportion or *quantum* of the annuity which

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(45) As to the continuing interest required to recover on a policy, see 11 Mee. & W. 10. This statute does not [except as to the prohibition of re-insurance (2 T. R. 161)] extend to foreign ships, upon which, as before the statute, there may still be insurances, *interest or no interest*. These were not included in the act, on account of the difficulty of bringing witnesses from abroad to prove the interest. (Doug. 316; 8 T. R. 13; 2 East, 385; 3 Bos. & P. 101). But where there is an interest on board, the owner by a *valued* policy may insure somewhat beyond the extent of the real value, because the adverse party has *admitted* the value. Such a case is held not to be within the statute, unless it should appear that the interest of the insured is so small as to be a mere evasion of the act, and a pretence for gaming. But if the loss be partial, then the amount must be proved, even under a valued policy. If the goods are fraudulently overvalued, to cheat the insurers, nothing can be recovered. (3 Camp. 319). Under an *open* policy, where no value is fixed, the prime cost of the goods must be proved. (2 Burr. 1170; 4 Burr. 1966).

An insurance for the benefit of an alien enemy, or on goods from an enemy's port to this country, though in a neutral vessel, is void. (6 T. R. 23, 35; 8 Id. 548; 1 East, 475; 8 Id. 273; see 1 Camp. 75; 1 Mau. & S. 450).—[CHITTY.]

Freight, or the benefit or profit of the vessel as a means of carriage, may be insured. (See 7 Scott, 507). Any insurance of seamen's wages, or any other right of the captain or crew, dependent on the freight, is void. (7 T. R. 157; 2 Camp. 626).

(46) The grantee of an annuity usually insures the life of the grantor, and will not advance the money till he is certain some insurance office will insure the life, and he usually adds the amount of the annual insurance to the annual interest, and makes the grantor pay both in one entire sum of perhaps 15*l.* per cent., so that in truth the grantee is, out of the pocket of the grantor, indemnified from all risk, and clears eleven or twelve per cent.—[CHITTY.]—An insurance is seldom an absolute security against every risk, (suicide for instance), and unless it is so, the transaction cannot be usurious. (See 4 Moo. & P. 793; 1 Cr. & J. 575).

ought to be granted. The real value of that contingency must depend on the age, constitution, situation, and conduct of the borrower; and therefore the price of such annuities cannot, without the utmost difficulty, be reduced to any general rules. So that if, by the terms of the contract, the lender's principal is *bonâ fide* (and not colourably [1]) put in jeopardy, no inequality of price will make it an usurious bargain; though, under some circumstances of imposition, it may be relieved against in equity. To throw, however, some check upon improvident transactions of this kind, which are usually carried on with great privacy, the statute 17 Geo. III. c. 26, has directed [47], that, upon the sale of any

[1] Carth. 67.

(47) The 17 Geo. 3, c. 26, is repealed by the 53 Geo. 3, c. 141, which is different in some of its details from the former statute. It provides that a memorial of every bond, deed, instrument, or other assurance, for the granting of any annuity or rent-charge, shall be enrolled in Chancery within thirty days after the execution. The memorial must contain the date, the names of the parties and witnesses, of the person or persons for whose life the grant is made, and of the persons by whom the same is to be beneficially received, the pecuniary consideration for the grant, and the sum to be annually paid, according to a form inserted in the statute. Companies, being grantors or grantees of annuities, &c., may be described by their usual firm or name of trade. Sect. 4 requires that where the grantee named in the deed shall not be entitled thereto beneficially, the name of the person who is so entitled, shall be described in the same manner as in the enrolment, otherwise such deed, &c. shall be void. Sect. 5. The grantee, upon twenty-one days' notice in writing from the grantor, must deliver a copy of the deed, &c. to the grantor, charging 6*d.* for every hundred words, and upon refusal to do so, or to permit an examination of the copy with the original, he may be compelled by summons before any of the judges of the Queen's Bench or Common Pleas. Sect. 6 provides, that *if any part of the purchase-money be returned*, or if it be paid partly in notes, and such notes, with the privity of the grantee, shall be cancelled or not paid when due; or if expressed to be paid in money, when the same is paid in goods, or *if any part is retained* under pretence of answering future payments of the annuity, &c. or on any other *pretence*, it shall be lawful for the person liable to pay the annuity, &c. to move the court to stay proceedings in any action upon the deed, &c. and the court may cancel the deed, &c. and order the judgment, if any has been entered, to be vacated. By sect. 8, contracts for purchase of annuities by persons under age are declared to be utterly void, any attempt to confirm the same on the infant's coming of age notwithstanding; and the soliciting of any person under age either directly or indirectly to grant any annuity, &c. or advancing or treating to advance any money upon consideration of an annuity, &c. to be granted when the infant comes of age, or to induce such infant to make oath, or give his word of honour or solemn promise, that he will not plead infancy or any other defence to such de-

life annuity of more than the value of ten pounds *per annum*, (unless on a sufficient pledge of lands in fee simple or stock

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mand when he comes of age, or that he will ratify such annuity, &c., is a misdemeanor, punishable by fine, imprisonment, or other corporal punishment, as the court shall think fit. By sect. 9, all solicitors, brokers, or others, acting between the parties in completing any annuity, loan, &c., who shall demand or accept in money or any other gratuity more than 10*s.* per cent. shall be guilty of a misdemeanor. Sect. 10 declares, that the act shall not extend to Scotland or Ireland, nor to any annuity given by will, marriage settlement, or for the advancement of a child, *nor to any annuity secured* [see 2 B. & Ad. 315; 5 B. & Al. 444] *on freehold, copyhold, or customary lands of equal annual value, whereof the grantor is seised in fee-simple, or fee-tail in possession*, or secured *by actual transfer in the funds*, [1 Sim. 153], *the dividends whereof are of equal value* with the annuity, &c., nor to any voluntary annuity, &c., without regard to pecuniary consideration, nor to annuities granted by any body corporate, or act of Parliament. By the 3 Geo. 4, c. 92, the insertion of the *names*, without any further address of the witnesses to an annuity deed, &c. is sufficient in the memorial. The 2nd section provides that every deed duly enrolled shall be valid, notwithstanding the omission to enrol any other deed or security relating to the same annuity.

The memorial must contain the date which the instrument bears, not that of its execution; (9 B. & Cr. 49); and, prior to the 7 Geo. 4, c. 75, it was necessary to state the christian name at length of the subscribing witness to the securities. (2 B. & Cr. 1). But that statute declares that no further or other names shall be required in the memorial than appear on the deeds.

The memorial need not state the name of the party in whose favour a warrant of attorney or collateral security was given, or for what penal sum it authorizes a confession of judgment; (3 B. & Al. 206; 4 Id. 281); and it suffices to state, that the annuity was granted for the lives of A. B., &c., (naming them), without stating their residence, or adding that it was granted for their joint lives, or the life of the survivor, or for a term of years determinable on those lives. (4 B. & Al. 281). Nor need it state that the annuity is redeemable. (3 B. & Al. 206). As to the description of the security in the memorial: if an instrument be described as an assignment of certain leasehold premises, though in truth an under-lease, that is sufficient. (2 B. & Cr. 251; see 2 B. & Ad. 767). Nor need a deed, assigning policies as collateral securities, be mentioned in the memorial. (2 B. & Cr. 232). The pecuniary consideration, and the mode of payment, and, if in notes, the kind of notes, whether of the Bank of England or of a provincial bank, must be exactly stated in the memorial. (2 Ad. & E. 135; 4 Moore, 402; see 2 Moo. & Sc. 822; 9 Sim. 89). The 4th section of 17 Geo. 3, and 6th section of 53 Geo. 3, c. 141, are not imperative on the court, and the court may refuse to vacate an annuity unless reasonable terms be acceded to by the applicant. (1 B. & Cr. 61; 4 B. & Al. 281; see 4 D. & Ry. 344; 8 Moore, 325; 1 You. & C., N. C. 36). A married woman, who has charged her separate estate to secure an annuity granted by her husband, may file a bill to avoid the grant for informality, without offering to return the consideration money. (5 Madd. 414; see Cr. & Ph. 48). The term "pretence" in the 6th sect. 53 Geo. 3, means *undue* pretence, and therefore where part of the consideration money for an annuity had been deposited in the hands of the grantee's attorney till

in the public funds) the true consideration, which shall be in money only, shall be set forth and described in the security itself; and a memorial of the date of the security, of the names of the parties, *cestuy que trusts, cestuy que vies,* and witnesses, and of the consideration money, shall, within twenty days after its execution, be inrolled in the court of chancery; else the security shall be null and void; and in case of collusive practices respecting the consideration, the court, in which any action is brought or judgment obtained upon such collusive security, may order the same to be cancelled, and the judgment (if any) to be vacated: and also all contracts for the purchase of annuities from infants shall remain utterly void, and be incapable of confirmation after such infants arrive to the age of maturity. But to return to the doctrine of common interest on loans:

Certain annuity securities must be inrolled.

[462]

Of interest and usury.

Upon the two principles of inconvenience and hazard, compared together, different nations have, at different times, established different rates of interest. The Romans at one time allowed *centesimae, one per cent.* monthly, or *twelve per cent. per annum,* to be taken for common loans; but Jus-

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certain houses upon which the annuity was to be secured were completed, and it appeared that the money deposited had all been paid over to the grantor a short time after the date of the deeds, and there was no fraud in the transaction, the court refused to set aside the annuity. (4 B. & Al. 281; see 2 B. & Ad. 767; 3 You. & J. 136). If the grantee of an annuity be himself an attorney, and charge brokerage, or excessively for the deeds, and retain his charges, that will be a retention of a part of the consideration under the acts; (5 T. R. 597); and if the person employed by the grantor to raise money, and by the grantee to pay the consideration, retain any part of it for a debt due to himself from the grantor, and for the expenses of deeds, the court will set aside the annuity on payment of principal and interest, though the grantee was not privy to the retainer. (2 Bingh. 370). Under the excepting clause it has been held, that where by the trusts of a marriage settlement a father agreed to settle 10,000*l.* upon his daughter, in trust to pay the interest to the husband during life, and the father died without ever having paid the principal money to the trustees, and the husband having agreed with the executors to accept 5000*l.* and an annuity of 125*l.* for life, in lieu of the 10,000*l.*, such annuity did not require inrolment. (2 B. & Cr. 875; see 3 Myl. & Cr. 550). So, if the consideration be the relinquishment of a business; (4 T. R. 793; 5 T. R. 639); or the bonâ fide sale of premises, whether leasehold or freehold; (5 B. Moore, 479); or in consideration of natural love and affection between relatives, though mixed with a valuable consideration; (5 B. Moore, 629); or any other than a pecuniary consideration paid and received, (7 East, 529; 5 B. Moore, 635; 1 Taunt. 356; 1 Cr., M. & R. 110; 4 Scott, 256),—the annuity need not be inrolled.

tinian [m] reduced it to *trientes*, or one third of the *as* or *centesimae*, that is, *four per cent.*; but allowed higher interest to be taken of merchants, because there the hazard was greater. So, too, Grotius informs us [n], that, in Holland, [463] the rate of interest was then eight *per cent.* in common loans, but twelve to merchants. And Lord Bacon was desirous of introducing a similar policy in England [o]: but our law

[m] Cod. 4. 32. 26. Nov. 33, 34, 35. —A short explication of these terms, and of the division of the Roman *as*, will be useful to the student, not only for understanding the civilians, but also the more classical writers, who perpetually refer to this distribution. Thus Horace, ad Pisones, 325.

Romani pueri longis rationibus assem
Discunt in partes centum *diducere. Dicat*
Filius Albini, si de quincunce *remota est*
Uncia, *quid superet? poterat dixisse*, triens: *eu,*
Rem poteris servare tuam! redit uncia, *quid sit?*
Semis.———

It is therefore to be observed, that, in calculating the rate of interest, the Romans divided the principal sum into an *hundred* parts; one of which they allowed to be taken monthly; and this, which was the highest rate of interest permitted, they called *usurae centesimae*, amounting yearly to twelve *per cent.* Now as the *as*, or Roman pound, was commonly used to express any integral sum, and was divisible into twelve parts or *unciae*, therefore these twelve monthly payments or *unciae* were held to amount annually to one pound, or *as usurarius;* and so the *usurae asses* were synonymous to the *usurae centesimae.* And all lower rates of interest were denominated according to the relation they bore to this centesimal usury, or *usurae asses:* for the several multiples of the *unciae*, or duodecimal parts of the *as*, were known by different names according to their different combinations; *sextans, quadrans, triens, quincunx, semis, septunx, bes, dodrans, dextans, deunx*, containing respectively 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 *unciae*, or duodecimal parts of an *as.* (Ff. 28. 5. 50. § 2. Gravin. Orig. Jur. Civ. l. 2, § 47). This being premised, the following table will clearly exhibit at once the subdivisions of the *as*, and the denominations of the rate of interest.

USURAE.	PARTES ASSIS.	PER ANNUM.
Asses, sive centesimae	*integer*	12 *per cent.*
Deunces	$\frac{11}{12}$	11
Dextances, vel decunces	$\frac{5}{6}$	10
Dodrantes	$\frac{3}{4}$	9
Besses	$\frac{2}{3}$	8
Septunces	$\frac{7}{12}$	7
Semisses	$\frac{1}{2}$	6
Quincunces	$\frac{5}{12}$	5
Trientes	$\frac{1}{3}$	4
Quadrantes	$\frac{1}{4}$	3
Sextances	$\frac{1}{6}$	2
Unciae	$\frac{1}{12}$	1

[n] De Jur. B. & P. 2. 12. 22.

[o] Essays, c. 41.

establishes one standard for all alike, where the pledge or security itself is not put in jeopardy; lest, under the general pretence of vague and indeterminate hazards, a door should be opened to fraud and usury: leaving specific hazards to be provided against by specific insurances, by annuities for lives, or by loans upon *respondentia*, or bottomry. But as to the rate of legal interest, it has varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII. c. 9, confined interest to ten *per cent.*, and so did the statute 13 Eliz. c. 8. But, as, through the encouragements given in her reign to commerce, the nation grew more wealthy, so, under her successor, the statute 21 Jac. I. c. 17, reduced it to eight *per cent.*; as did the statute 12 Car. II. c. 13, to six: and lastly, by the statute 12 Ann. st. 2. c. 16, it was brought down to five *per cent.* yearly, which is now the extremity of legal interest that can be taken[48]. But, yet, if a contract which carries interest

Statute 12 Ann. st. 2, c. 16, against usury.

(48) The enactment, in the statute of Anne is in these words:—"That no person or persons whatsoever, upon any contract, take, directly or indirectly, for loan of any monies, wares, [see 1 Br. C. C. 149; 3 B. & C. 270], merchandize, or other commodities whatsoever, above the value of five pounds for the forbearance of one hundred pounds; and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, for payment of any principal or money to be lent, or covenant to be performed, upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of five pounds in the hundred as aforesaid, shall be utterly void; and that all and every person or persons whatsoever, who shall upon any contract take, accept, and receive, by way or means of any corrupt bargain, loan, exchange, chevizance, shift, or interest, of any wares, merchandize, or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance for the forbearing or giving day of payment for one whole year of and for their money or other thing above the sum of 5*l.* for the forbearing of 100*l.* for a year, and so after that rate, &c., shall forfeit and lose for every such offence the treble value of the monies, wares, merchandizes, and other things so lent, bargained, exchanged, or shifted."

The stat. 5 & 6 Will. 4, c. 41, (extending the remedy of the 58 Geo. 3, c. 93), after reciting the above statute, and other statutes which declare securities upon certain illegal considerations to be void; and that *securities* and instruments made void by the said acts are sometimes transferred to persons for valuable consideration without notice of the original consideration for which they were given, and the avoidance thereof in the hands of such persons is often attended with great hardship and injustice, enacts, that as much of the said act as enacts that any *note*, *bill*, or *mortgage* shall be absolutely void, shall

be made in a foreign country, our courts will direct the payment of interest according to the law of that country in

be repealed; but every note, bill, or mortgage, which, by virtue of any of the said acts would have been void, shall be deemed to have been made, drawn, accepted, given, or executed for an illegal consideration. And it provides, that the maker, &c., of any such security, if he shall be obliged to discharge it in the hands of any bonâ fide holder, shall recover the amount from the person to whom the security was originally given.

The stat. 13 Geo. 3, c. 63, s. 30, prohibits British subjects in the East Indies from taking more than twelve per cent. On the other hand, by the 14 Geo. 3, c. 79, all securities made by British subjects in Great Britain concerning lands or other things in Ireland or any British West India colony, to British subjects for repayment of moneys lent and interest, and all bonds, &c., for securing the same, and all transfers thereof, are declared, if duly registered according to the law of the place, to be as valid as if made in the place where the property is situate, so as the interest secured do not exceed 6*l.* per cent.; provided the lender do not knowingly lend more money than the security is worth at the time. The stat. 3 Geo. 4, c. 17, without repealing the above act, declares all securities concerning lands, &c., in Ireland or the West Indies, and all conveyances, &c., bonds, and covenants executed in Great Britain, either by the borrower upon such security, or any other person collaterally or otherwise, and whether to secure a higher rate of interest than the principal securities or not, and whether contemporaneous or subsequent, shall be as valid as if the person making such conveyance, &c., had resided in the country where the lands, &c., lie. (See 6 T. R. 425).

Bills of exchange having not more than three months to run were permanently taken out of the Statute of Usury by 3 & 4 Will. 4, c. 98, s. 7; and this exemption has been extended by subsequent temporary statutes, that now in force being the 2 & 3 Vict. c. 37 (continued by the 6 & 7 Vict. c. 45, to the 1st January, 1846), which enacts, "that no bill of exchange or promissory note made payable at or within twelve months after the date thereof, *or* not having more than twelve months to run, *nor* any contract for the loan or forbearance of money above the sum of 10*l.*, shall, by reason of any interest taken thereon or *secured* thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note, be void; nor shall the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected by reason of any statute or law in force for the prevention of usury;" nor shall any person drawing, &c., any such bill, &c., be liable to penalties:—"*Provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein.*" (See 4 Deac. 145; 2 Nev. & P. 78). It seems that, if a mortgage of land is made as a primary transaction, whether reserving usurious interest or not, and a note is given for the purpose of securing usurious interest upon the principal so lent, the note (and if the note, or the contract for it, was contemporaneous with the mortgage, the whole transaction) would be void. (7 Scott, 310; but see 10 Ad. & El. 675; 5 M. & W. 173; Id. 336). Whether a real security subsequently given for money due upon a usurious transaction protected by the statute will be void, is not clear.

which the contract was made [p]. Thus, Irish, American, Turkish, and Indian interest, have been allowed in our courts to the amount of even twelve per cent.; for the moderation or exorbitance of interest depends upon local circumstances; and the refusal to inforce such contracts would put a stop to all foreign trade. And, by statute 14 Geo. III. c. 79, all mortgages and other securities upon estates, or other property in Ireland, or the plantations, bearing interest not exceeding six per cent. shall be legal; though executed in the kingdom of Great Britain: unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case also, to prevent usurious contracts at home under colour of such foreign securities, the borrower shall forfeit treble the sum so borrowed [49].

Of debts.

4. The last general species of contracts, which I have to mention, is that of *debt;* whereby a *chose* in action, or

[p] 1 Equ. Cas. Abr. 289. 1 P. Wms. 395.

(See 7 Scott, 310; 2 Ad. & Ell. 326). It is, at any rate, clear, that an original transaction will remain good, notwithstanding any subsequent attempt to draw in a real security; the rule being that a transaction originally illegal vitiates all subsequent securities for the rights intended to grow out of it; but an illegal security for or addition to an existing right or contract will not affect it, unless, perhaps, being a security of a higher nature, by merger. (1 Saund. 249, 295; see 2 Taunt. 184; 1 Car. & P. 396).

In cases which remain subject to the statute of Anne, it must be remembered that a contract is not tainted with usury when the principal is put into danger (insolvency of course not constituting a risk for this purpose, 3 Nev. & M. 665). It is so tainted, when the principal and lawful interest are secured at all events, with either a certainty or a chance of some further profit. (Cro. Jac. 507, 778; 2 B. & Ad. 112). Where the principal is absolutely gone, so much so that the party who has paid has no right, or only a contingent right, to sue for it back, as in the case of a purchase of an annuity, there is no usury, (Id.), unless, of course, the annuity is for a fixed term, and of such amount that the sum of the annual payments must exceed the consideration paid, with legal interest. (3 B. & Al. 664; 3 Nev. & M. 665). So, the purchase of a bond for less than is due is valid. (2 Sch. & Lef. 467). So, upon contracts to transfer stock at a future day, if the lender be secure from loss, and may realise a profit beyond legal interest, it is usurious under the statute of Anne; but if there is a possibility that he may be a loser, it is not. (3 B. & A. 257; 8 East, 304; 3 Bligh, N. S. 560). As to the loan and sale of stock and the Stock Jobbing Acts, (7 Geo. 2, c. 8, 10 Geo. 2, c. 8), see 8 East, 304; 6 Mee. & W. 58; 7 Id. 20. As to the small charges beyond the legal rate of interest for discounts, commission, &c., see 3 Camp. 488; 4 Mau. & S. 192; 12 Moore, 277; 11 Mee. & W. 333.

(49) See the note, ante, p. 463.

right to a certain sum of money, is mutually acquired and lost [q]. This may be the counterpart of, and arise from, any of the other species of contracts. As, in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the sum agreed on; and the vendor has a property in this price, as a *chose* in action, by means of this contract of debt. In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract, that he should execute the trust reposed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire of the horse, or the like. Any contract in short whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquisition; being [465] usually divided into debts of *record*, debts by *special*, and debts by *simple* contract.

A debt of *record* is a sum of money which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law; this is a contract of the highest nature, being established by the sentence of a court of judicature [50]. Debts upon recognizance are also a

Debts of record by judgment.

Upon recognizance.

[q] F. N. B. 119.

(50) Debts or *contracts of record*, being sanctioned in their creation by some court or magistrate having competent jurisdiction, have certain particular properties distinguishing them as well from simple contracts as from specialties. 1st. These debts or contracts cannot in pleading be impeached or affected by any supposed defect or illegality in the transaction on which they are founded; and if a judgment be erroneous, that circumstance will afford no answer to an action of debt upon it, and the only course for the defendant is to reverse it by writ of error; (2 Burr. 1005; 4 East, 311; 2 Lev. 161; Gilb. on U. & T. 109; Gilb. Debt, 412; Yelv. 155; Tidd, 6th ed. 1152); and though third persons, who have been defrauded by a collusive judgment, may shew such fraud, so as to prevent themselves from being prejudiced by it, (13 Eliz. c. 3; 2 Marsh. 392; 7 Taunt. 97), the parties to such judgment are estopped at law from pleading such a plea, and must in general

sum of money, recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behaviour, or the like: and these, together with statutes-merchant and statutes-staple, &c., if forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, viz. debts of record; since the contract on which they are founded is witnessed by the highest kind of evidence, viz. by matter of record.

Debts by specialty.

Debts by *specialty*, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due, by deed or instrument under seal. Such as, by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation: which last we took occasion to explain in the twentieth chapter of the present book; and then shewed that it is a creation or acknowledgment of a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law. These are looked upon as the next class of debts

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apply for relief to a court of equity. (13 Eliz. c. 5; 2 Marsh. 392; 7 Taunt. 97; 1 Anstr. 8). There is, however, one instance in which a party may apply to the common-law court to set the judgment aside, viz. where it has been signed upon a warrant of attorney, given upon an unlawful consideration, or obtained by fraud, in which case, as this is a peculiar instrument, affording the defendant no opportunity to resist the claim by pleading, and frequently given by persons in distressed circumstances, the court will afford relief upon a summary application. (Dougl. 196; Cowp. 727; 1 Hen. Bla. 75). Another peculiar property of a contract of record is, that its existence, if disputed, must be tried by inspection of the record, entry of recognizance, &c., and not by a jury of the country. (Tidd, 6th edit. 797-8). But notwithstanding, since the Act of Union, an Irish judgment is a record, yet it is only proveable by an examined copy on oath, and therefore it is only triable by a jury. (5 East, 473). Another quality, and one of the most important, is, that a judgment, when registered, binds the land as against subsequent purchasers, (Tidd, 6th edit. 966-7; vide ante, p. 161, n.), and such a judgment and a recognizance is entitled to preference to a specialty and other debts of an inferior nature. (6 T. R. 384; Tidd, 6th edit. 267). Lastly, if a judgment be obtained expressly for a simple contract or specialty debt, and not as a collateral security, the inferior demand is merged, according to the rule, *transit in rem judicatam;* but if the judgment were obtained merely as a collateral security, the creditor retains an election to proceed either on the judgment or inferior security. (3 East, 258).—[CHITTY.]

after those of record, being confirmed by special evidence, under seal.

Debts by *simple contract* are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better, than a verbal promise [51]. It is easy to see into what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionally hinted at; and the rest, to avoid repetition, must be referred to those particular heads in the third book of these commentaries, where the breach of such contracts will be considered. I shall only observe at present, that, by the statute 29 Car. II. c. 3, no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making; unless the agreement, or some memorandum thereof, be in writing, and signed by the party himself, or by his authority [52].

Debts by simple contract.

[466]

Stat. 29 Car. 2, c. 3, certain promises to pay to be made in writing.

But there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of *paper credit*, deserves a more particular regard. These are debts by *bills of exchange*, and *promissory notes* [53].

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(51) An I. O. U., which requires no stamp, is primâ facie evidence of a loan. (12 Ad. & E. 641).

(52) See 3 vol. page 159. The Bankrupt Act, 6 Geo. 4, c. 16, s. 131, denies validity to any promise by a bankrupt to pay a debt discharged by his certificate, unless such promise is made under the hand of the bankrupt, or of his agent authorized in writing. And the stat. 9 Geo. 4, c. 14, requires an acknowledgment of a debt barred by the Statute of Limitations to be made in writing, but leaves full effect to payment of interest or part of the principal. (See 6 Mee. & W. 824; 3 Per. & D. 529). The same statute confines the operation of an acknowledgment by a joint contractor to his own liability.

(53) See 4 Scott, 79; 7 Mee. & W.

Bills of exchange.

A bill *of exchange* is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A. lives in Jamaica, and owes B., who lives in England, 1000*l.*, now if C. be going from England to Jamaica, he may pay B. this 1000*l.*, and take a bill of exchange drawn by B. in England upon A. in Jamaica, and receive it when he comes thither. Thus does B. receive his debt, at any distance of place, by transferring it to C.; who carries over his money
[467] in paper credit, without danger of robbery or loss. This method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices; in order the more easily to draw their effects out of France and England, into those countries in which they had chosen to reside. But the invention of it was a little earlier: for the Jews were banished out of Guienne in 1287, and out of England in 1290[r]; and in 1236 the use of paper credit was introduced into the Mogul empire in China[s]. In common speech, such a bill is frequently called a *draught*, but a *bill of exchange* is the more legal as well as mercantile expression.

Drawer, drawee, and payee.

The person, however, who writes this letter, is called in law the *drawer*, and he to whom it is written the *drawee;* and the third person, or negotiator, to whom it is payable (whether specially named, or the *bearer* generally) is called the *payee*[54].

[r] 2 Carte, Hist. Engl. 203, 206. [s] Mod. Un. Hist. iv. 499.

410. A cheque is a bill of exchange addressed to a banker, and payable to a person named, or *the bearer*. Such a cheque is binding on the banker having assets of the drawer, without acceptance. (1 B. & Ad. 415). This is founded on the promise implied from the banking contract; and so in cases where a written acceptance is not necessary, a previous promise to accept bills to a certain amount is equivalent to an acceptance of them when drawn. (Burr. 1663; Doug. 284; see 3 Camp. 393; 6 Car. & P. 218). A cheque must be presented within a reasonable time, *i. e.* in the course of the following day after receiving it. (4 B. & Ad. 752; 2 Scott, N. R. 555).

(54) See Bayley on Bills, Chitty on Bills, and Byles on Bills. The subject is so very slightly commented on in the

These bills are either *foreign*, or *inland; foreign*, when drawn by a merchant residing abroad upon his correspondent in England, or *vice versa;* and *inland*, when both the drawer and the drawee reside within the kingdom[55]. Formerly, foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now, by two statutes, the one 9 & 10 W. III. c. 17, the other 3 & 4 Ann. c. 9, inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such [t], being by those statutes expressly enacted with regard to the other. So that now there is not in law any manner of difference between them[56].

Foreign and inland bills.

Stat. 9 & 10 Will. 3, and 3 & 4 Ann. c. 9.

Promissory notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also, by the same statute 3 & 4 Ann. c. 9, are made assignable and indorsable in like manner as bills of exchange[57]. But, by statute 15 Geo. III. c. 51, all promissory or other notes, bills of exchange, draughts, and undertakings in writing, being negotiable or transferable, for the payment of less than twenty shillings, are declared to be null and void; and it is made penal to utter or publish any such; they being deemed

Promissory notes.

Stat. 3 & 4 Ann. c. 9, made perpetual by 7 Ann. c. 25, s. 3.

Stat. 15 Geo. 3, c. 51.

[468]

[t] 1 Roll. Abr. 6.

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text, that it will be essential to the student to look into one of the works referred to, in order to obtain a competent knowledge of the subject.

(55) See 2 Cr. M. & R. 468. A bill both drawn and payable in Ireland, or in Scotland, is an inland bill; but if it is drawn in one of the three kingdoms, and payable in another, it is a foreign bill. (2 B. & Ad. 478).

(56) Except that every inland bill must be stamped, and have a written acceptance; and also except as to protest, which is only requisite in case of a foreign bill. (7 East, 358; 2 B. & Al. 696; see 2 & 3 Will. 4, c. 98).

(57) This enactment, which extends also to foreign notes, (1 B. & Cr. 192; 2 B. & Ad. 385), was made mainly in consequence of the refusal of the judge to recognise the practice of merchants in negotiating promissory notes on the same footing as bills of exchange. (2 Ld. Raym. 757). As to the commencement of the recognition of inland bills by the English Courts, see 6 Mod. 29.

Stat. 17 Geo. 3, c. 30.

prejudicial to trade and public credit [58]. And, by 17 Geo. III. c. 30, all such notes, bills, draughts, and undertakings, to the amount of twenty shillings, and less than five pounds, are subjected to many other regulations and formalities; the omission of any one of which vacates the security, and is penal to him that utters it [59].

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(58) The 48 Geo. 3, c. 88, repeals this statute for the purpose of re-enacting the same restrictions with a more summary mode of punishing offenders. It provides that the penalty, not exceeding 20*l.* nor less than 5*l.*, shall be recoverable before a single justice of the peace, at any time within twenty days after the offence has been committed, one moiety to the offender, and the other to the poor of the parish; and in default of payment, either voluntarily or by distress, the offender may be imprisoned for three months.—[CHITTY.]

(59) Made perpetual by the 27 Geo. 3, c. 16. These requisitions are, that the draft state the name and abode of the payee, be attested by a subscribing witness, bear date at or before the time of issue, and be made payable within twenty-one days after date, but not to bearer on demand. Such drafts are not negotiable after the day of payment. It was the policy of the legislature to suspend this act from time to time. The last of these suspending acts was the 3 Geo. 4, c. 70, repealed by the 7 Geo. 4, c. 6, which put an end to the issue of small notes after the 5th April, 1829; and the 9 Geo. 4, c. 5, prohibits the uttering in England of Scotch or Irish notes for less than five pounds.

The acts of Parliament from which the Bank of England formerly derived its exclusive privileges declared it to be unlawful for any other company of more than six persons to borrow, owe, or take up any money on their bills or notes payable on demand, or at any time less than six months. This restriction was relaxed by the 7 Geo. 4, c. 46, which permitted banking companies of more than six members to make and issue their bills and notes at any place beyond sixty-five miles from London, payable on demand, or otherwise, at some place or places specified therein and beyond sixty-five miles from London; such companies not having any place of business as bankers within that distance from London. But this restriction as to distance did not extend to bills for the amount of 50*l.* or upwards, payable in London or elsewhere, at any period after date or after sight. The stat. 9 Geo. 4, c. 23, which enables bankers in England, (except within the city of London or three miles therefrom), under certain regulations to issue unstamped promissory notes and bills payable at or within seven days after sight, or (as to bills) within seventy-one days after date, contains a saving of the privileges of the Bank of England. The stat. 3 & 4 Will. 4, c. 83, authorizes any banking company of more than six members to make their bills or notes payable in London by their agent, or to draw any bill or note upon any such agent in London, payable on demand, or otherwise, in London, and for any less amount than 50*l.*, notwithstanding the 7 Geo. 4, c. 46. But this enactment seems to be restrained by the last Bank Charter Act, (3 & 4 Will. 4, c. 98, s. 2), passed later in the same session, which enacts, that, during the continuance of the privileges of the Bank of England, no corporation or partnership consisting of more than six persons shall make or issue in London,

The payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied* contract, viz. that, provided the drawee does not pay the bill, the drawer will: for which reason it is usual, in bills of exchange, to express that the *value* thereof hath been *received* by the drawer [u]; in order to shew the consideration, upon which the implied contract of repayment arises [60]. And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no *chose* in action is assignable: which assignment is the life of paper credit [61]. It may, therefore,

[u] Stra. 1212.

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or within sixty-five miles thereof, any bill, or note, or engagement for the payment of money on demand, or upon which any person holding the same may obtain payment on demand. Provided that nothing in the 7 Geo. 4, c. 46, shall be construed to prevent any corporation or partnership transacting banking business at a greater distance than sixty-five miles from London, and not having any house of business or establishment as bankers in London, or within sixty-five miles thereof, (except as hereinafter mentioned), to make and issue their bills and notes, payable on demand, or otherwise, at the place of issue, being more than sixty-five miles from London, and also in London, and to have an agent or agents in London, or at any other place at which such bills or notes shall be made payable, for the purpose of payment only. But no such bill or note shall be for any sum less than 5*l.*, or be re-issued in London, or within sixty-five miles thereof.

The authority contained in the stat. 3 & 4 Will. 4, c. 83, only extends to companies of more than six members carrying on business beyond sixty-five miles from London. It had been supposed that the statute referred to companies of more than six members prohibited from carrying on *any* banking business within the above-mentioned limits; but the doubts on this head were removed by the 3rd section of the stat. 3 & 4 Will. 4, c. 98, which enacts that any company of more than six persons may carry on the business of banking in London, or within sixty-five miles thereof, *provided* such company do not borrow, owe, or take up in England any money on their bills or notes payable on demand, or at less than six months from the borrowing thereof.

The courts have shewn every disposition to protect the privileges of the Bank of England, and to discountenance any attempts at evading the restrictions which have been placed upon other banking companies. (See 4 Scott, 50; 1 Scott, N. R. 701; 2 Keen, 318, 466).

(60) See 11 Ad. & E. 702. As to the effect of failure of consideration, when the bill is in the hands of an indorsee without notice, see 2 Q. B. R. 196.

(61) " A promissory note is not a personal chattel in possession, but a

be of some use, to mention a few of the principal incidents attending this transfer or assignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other persons than those with whom he originally contracted.

Assignment of bills and notes.

In the first place, then, the payee, or person to whom or whose *order*[62] such bill of exchange or promissory note is payable, may, by indorsement, or writing his name *in dorso*, or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee; and he may assign the same to another, and so on *in infinitum*[63]. And a promissory note payable to A or *bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it[v]. But, in case of a bill of exchange, the payee, or the indorsee (whether it be a general or particular indorsement), is to go to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill. If the drawee accepts the bill, either verbally or in writing[w], he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20*l.* or upwards, and expressed to be for value received, the payee or indorsee may protest it for *non-acceptance*; which protest must be made in writing, under a copy of such bill of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must, within fourteen days after, be given to the drawer[64].

[469]

Acceptance.

Protest for non-acceptance.

[v] 2 Show. 235.—Grant *v.* Vaughan, T. 4 Geo. III. B. R. [w] Stra. 1000.

chose in action of a peculiar nature, which has indeed been made by statute assignable and transferable according to the custom of merchants, like a bill of exchange; yet still it is a chose in action, and nothing more." (6 Mee. & W. 426.)

(62) It is essential, since the Stamp Act, to the negotiability of a bill or note that the engagement be to pay to the *order* of the payee. (2 Scott, 423).

(63) See 8 Mee. & W. 501; 11 Id. 97.

(64) With respect to *acceptance* and *protest*, the law now is, in several ma-

But, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due, (which three days are called days of grace [65]), the payee or indorsee is then to get it protested

Days of grace.

Protest for non-payment.

terial points, different from the statement of it in the text. Acceptance is not necessary, though usual and desirable on bills payable at a certain time; but when the bill is payable at a certain distance of time after *sight*, then acceptance is essential and should not be delayed, because, as the time for payment of the bill does not begin to run till it is accepted, (6 T. R. 212; Bayl. 112; Chitty on Bills, 268), the responsibility of the drawer would be thereby protracted. Acceptance of an *inland* bill can now be in *writing* only on the face of the bill itself, by 1 & 2 Geo. 4, c. 78, though formerly, notwithstanding the 3 & 4 Ann. c. 9, s. 5, as is the case still with foreign bills, it might have been verbal, or in writing on any other paper; (2 Str. 1000; 4 East, 67; 5 East, 514); and the naming of a place of payment is not restrictive, unless restrictive words be added. (Id.; see 4 Scott, N. R. 617, and as to Ireland, 9 Geo. 4, c. 4, s. 8). But in all cases, whether of an inland or foreign bill, if it be presented and acceptance is refused, prompt notice (within fourteen days will not suffice, but usually the next day to the immediate indorser, and each indorser is allowed a day) must be given to the drawer and indorsers, or they will be discharged from responsibility. Upon non-acceptance, the holder may immediately sue the drawer, (2 Camp. 458), and indorsers, (4 East, 481), without waiting till the bill become due, according to the terms of it. No protest of an inland bill is essential to entitle the holder to recover interest and costs; and protest and noting now seem useless. (2 B. & A. 696; Chitty on Bills, 8th ed. 500). As to the form of notice of dishonour, in the construction of which the courts have recently adopted the most inconvenient refinements, see 5 Moo. & P. 475; 1 Scott, 1; 7 Mee. & W. 436; 2 Gale & D. 116; 3 Gale & D. 69. As to notice of dishonour of a foreign bill, see 4 Per. & D. 737; 2 Q. B. R. 419, 421.

(65) A bill or note is not now considered due or demandable till the last day of the three days' grace; as if a bill or note is dated on the 12th of any month, and made payable ten days, one week, or one month after date, payment must be demanded on the 25th, the 22nd of the same, and on the 15th of the next month respectively. But if the third day of grace falls on a Sunday the bill or note is payable and due on the Saturday preceding; and by 39 & 40 Geo. 3, c. 42, if payable on Good Friday, they are due the day before, as they are when they become due on a Sunday or on a Christmas day. [This provision is extended to proclaimed days of fast and thanksgiving by the 7 & 8 Geo. 4, c. 15.] Days of grace are allowed upon promissory notes, in like manner as upon bills of exchange. (4 T. R. 148). [Days of grace are not allowed upon bills or notes payable on demand, (which is implied where no time of payment is named, (2 B. & Cr. 157; Bayley, 98)); but the rule seems to be different, if they are made payable at sight. (3 Dough. 421; 7 B. & Cr. 468; 1 C. M. & R. 309; 6 Car. & P. 320).]

A promissory note made payable to A., without adding *or to his order, or to bearer*, though not negotiable, is a note within the statute, and the three days of grace must be allowed upon it. (6 T. R. 123).

A bill or note must be drawn upon

for *non-payment*, in the same manner, and by the same persons who are to protest it in case of non-acceptance, and such protest must also be notified, within fourteen days after, to the drawer. And he on producing such protest, either of non-acceptance or non-payment, is bound to make good to the payee, or indorsee, not only the amount of the said bill (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law [x]), but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill, when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws
[470] a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid, when due, the person to whom it is payable, shall in convenient time give the drawer notice thereof; for, otherwise, the law will imply it paid: since it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time; when in the mean time all reckonings and accounts may be adjusted between the drawer and the drawee [y].

Notice of dishonour.

Relative liabilities of parties to a bill or note.

If the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer, or the indorser, or, if the bill has been negotiated through many hands, upon any of the indorsers; for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more in-

[x] Lord Raym. 993. [y] Salk. 127.

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a proper stamp, and if it be drawn upon a greater stamp than the statutes require, it cannot be received in evidence. [This inconvenience was removed by the stat. 43 Geo. 3, c. 127, s. 6; and see the larger provisions of the stat. 55 Geo. 3, c. 184, s. 10.] But the plaintiff may recover as for so much money lent or advanced, if he can prove the defendant's promise to pay, or the consideration received by him from the plaintiff, independently of the imperfect note. (1 East, 55).—[CHRISTIAN.] (See 1 B. & Ad. 670, 696).

dorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorser has nobody to resort to, but the drawer only [66].

What has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another; only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange against the prior indorsers.

(66) The holder of the bill may bring actions against the acceptor, drawer, and all the indorsers at the same time; but though he may obtain judgments in all the actions, yet he can recover but one satisfaction for the value of the bill; but he may sue out execution against all the rest for the costs of their respective actions. (Bayley, 43).—[CHRISTIAN.]

CHAPTER XXXI.

OF TITLE BY BANKRUPTCY.

THE preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of

X. Title by bankruptcy.

X. Bankruptcy; a title which we before lightly touched upon [a], so far as it related to the transfer of the real estate of the bankrupt. At present, we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements [1]. Let us, therefore, first of all consider, 1. *Who* may become a bankrupt: 2. What *acts* make a bankrupt: 3. The *proceedings* on a commission of bankrupt: and 4. In what manner an estate in goods and chattels may be *transferred* by bankruptcy.

I. Who may become a bankrupt.

1. Who may become a bankrupt. A bankrupt was before [b] defined to be "a trader, who secretes himself, or does certain other acts, tending to defraud his creditors." He was formerly considered merely in the light of a criminal or offender [c 2]; and in this spirit we are told by Sir Edward

[a] See page 285. [b] Ibid. [c] Stat. 1 Jac. I. c. 15. § 17.

(1) For the existing law of bankruptcy see the note at the end of this chapter.

(2) Throughout the three first statutes the bankrupt is uniformly called an offender, and the original design of the bankrupt laws appears to have been to prevent and defeat the frauds of criminal debtors; for the 34 & 35 Hen. 8, c. 4, the first bankrupt statute, begins with this preamble:—"Whereas divers and sundry persons craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors their debts and duties,

Coke[d], that we have fetched as well the name, as the wickedness of bankrupts from foreign nations[e]. But at present [472] the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor, by exempting him from the rigor of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt: whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.

In this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body into pieces, and each of them take his proportionable share: if, indeed, that law, *de debitore in partes secando*, is to be understood in so very butcherly a light; which many learned men have with reason doubted[f]. Nor do

[d] 4 Inst. 277.

[e] The word itself is derived from the word *bancus* or *banque*, which signifies the table or counter of a tradesman, (Dufresne, I. 969) and *ruptus*, broken; denoting thereby one whose shop or place of trade is broken and gone; though others rather choose to adopt the word *route*, which in French signifies a trace or track, and tell us that a bankrupt is one who hath removed his banque, leaving but a trace behind. (4 Inst. 277). And it is observable that the title of the first English statute concerning this offence, 34 Hen. VIII. c. 4, "against such persons as do make bankrupt," is a literal translation of the French idiom, *qui font banque route*.

[f] Taylor, Comment. in L. decemviral. Bynkersh. Observ. Jur. I. 1. Heinecc. Antiq. III. 30. 4.

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but at their own wills and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience." The bankrupt being deemed an offender, and being completely divested of the disposition of his property, these statutes at the first would naturally be considered penal statutes; for this reason, I presume, the 21 Jac. 1, c. 19, begins by declaring that "the aforesaid statute shall be largely and beneficially construed and expounded for the aid and relief of the creditors."—[CHRISTIAN.]

I mean those less inhuman laws (if they may be called so, as *their* meaning is indisputably certain), of imprisoning the debtor's person in chains; subjecting him to stripes and hard labour, at the mercy of his rigid creditor; and sometimes selling him, his wife, and children, to perpetual foreign slavery *trans Tiberim* [g]: an oppression, which produced so
[473] many popular insurrections, and secessions to the *mons sacer*. But I mean the law of *cession*, introduced by the Christian emperors; whereby, if a debtor *ceded*, or yielded up all his fortune to his creditors, he was secured from being dragged to a gaol, "*omni quoque corporali cruciatu* "*semoto*" [h]. For, as the emperor justly observes [i], "*inhumanum erat spoliatum fortunis suis in solidum damnari.*" Thus far was just and reasonable: but, as the departing from one extreme is apt to produce its opposite, we find it afterwards enacted [k], that, if the debtor by any unforeseen accident was reduced to low circumstances, and would *swear* that he had not sufficient left to pay his debts, he should not be compelled to cede or give up even that which he had in his possession: a law which, under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

The laws of England, more wisely, have steered in the middle between both extremes: providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up; and at the same time taking care that all his just debts shall be paid, so far as the effects will extend. But still they are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and therefore they allow the benefit of the laws of bankruptcy to none but actual *traders*; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion,

[g] In Pegu, and the adjacent countries in East India, the creditor is entitled to dispose of the debtor himself, and likewise of his wife and children; insomuch that he may even violate with impunity the chastity of the debtor's wife, but then, by so doing, the debt is understood to be discharged. (Mod. Un. Hist. vii. 128).

[h] Cod. 7. 71. per tot.

[i] Inst. 4. 6. 40.

[k] Nov. 135. c. 1.

even though they meet with sudden accidents that may reduce their fortunes: for the law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if, at such time, he has no sufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he suffers the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides: the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as, by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault. To the misfortunes, therefore, of debtors, the law has given a compassionate remedy, but denied it to their faults: since, at the same time that it provides for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also (to discourage extravagance) declared that no one shall be capable of being made a bankrupt, but only a *trader;* nor capable of receiving the full benefit of the statutes, but only an *industrious* trader.

Persons subject to the bankrupt laws.

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The first statute made concerning any English bankrupts, was 34 Hen. VIII. c. 4, when trade began first to be properly cultivated in England: which has been almost totally altered by statute 13 Eliz. c. 7, whereby bankruptcy is confined to such persons only as have *used the trade of merchandize,* in gross or by retail, by way of bargaining, exchange, re-change, bartering, chevisance[1], or otherwise; or have *sought their living by buying and selling.* And by statute 21 Jac. I. c. 19, persons using the trade or profession of a *scrivener,* receiving other men's monies and estates into their trust and custody, are also made liable to the statutes of bankruptcy: and the benefits, as well as the penal parts of

The first Bankrupt Act, 34 Hen. 8, c. 4.

Stat. 21 Jac. 1, c. 19.

[1] That is, making contracts. (Dufresne, II. 569).

Aliens and denizens.

the law, are extended as well to *aliens* and *denizens* as to natural-born subjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives. By many subsequent statutes, but lastly by statute 5 Geo. II. c. 30 [m], *bankers, brokers,* and *factors,* are declared liable to the statutes of bankruptcy; and this upon the same reason that scriveners are included by the statute of James I., viz. for the relief of their creditors; whom they have otherwise more opportunities of defrauding than any other set of dealers: and they are properly to be looked upon as traders, since they make merchandize of money, in the same manner as other merchants do of goods and other moveable chattels. But, by the same act [n], no *farmer, grazier,* or *drover,* shall (as such) be liable to be deemed a bankrupt: for, though they buy and sell corn, and hay, and beasts, in the course of husbandry, yet trade is not their principal, but only a collateral, object; their chief concern being to manure and till the ground, and make the best advantage of its produce. And, besides, the subjecting them to the laws of bankruptcy might be a means of defeating their landlords of the security which the law has given them above all others, for the payment of their reserved rents; wherefore, also, upon a similar reason, a *receiver of the king's taxes* is not capable [o], as such, of being a bankrupt; lest the king should be defeated of those extensive remedies against his debtors, which are put into his hands by the prerogative. By the same statute [p], no person shall have a commission of bankrupt awarded against him, unless at the petition of some *one* creditor, to whom he owes 100*l.*; or of *two,* to whom he is indebted 150*l.*; or of *more,* to whom altogether he is indebted 200*l.* For the law does not look upon persons whose debts amount to less, to be traders considerable enough, either to enjoy the benefit of the statute themselves, or to entitle the creditors, for the benefit of public commerce, to demand the distribution of their effects.

Bankers, brokers, and factors.

Farmers, graziers, and drovers excepted.

Petitioning creditor's debt.

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What is a trading.

In the interpretation of these several statutes, it hath been held, that buying only, or selling only, will not qualify a man to be a bankrupt; but it must be both buying and selling, and also getting a livelihood by it. As, by exercising the calling of a merchant, a grocer, a mercer, or, in one general

[m] § 39. [n] § 40. [o] § eod. [p] § 23.

word, a *chapman*, who is one that buys and sells any thing. But no handicraft occupation (where nothing is bought and sold, and where therefore an extensive credit for the stock in trade is not necessary to be had) will make a man a regular bankrupt; as that of a husbandman, a gardener, and the like, who are paid for their work and labour [q]. Also an inn-keeper cannot, as such, be a bankrupt [r]: for his gain or livelihood does not arise from buying and selling in the way of merchandize, but greatly from the use of his rooms and furniture, his attendance, and the like: and though he may buy corn and victuals, to sell again at a profit, yet that no more makes him a trader, than a schoolmaster or other person is, that keeps a boarding house, and makes considerable gains by buying and selling what he spends in the house; and such a one is clearly not within the statutes [s]. But where persons buy goods, and make them up into saleable commodities, as shoe-makers, smiths, and the like; here, though part of the gain is by bodily labour, and not by buying and selling, yet they are within the statutes of bankrupts [t]: for the labour is only in melioration of the commodity, and rendering it more fit for sale.

Innkeeper.

Schoolmaster.

One single act of buying and selling will not make a man a trader; but a repeated practice, and profit by it. Buying and selling bank-stock, or other government securities, will not make a man a bankrupt; they not being goods, wares, or merchandize, within the intent of the statute, by which a profit may be fairly made [u]. Neither will buying and selling under particular restraints, or for particular purposes; as, if a commissioner of the navy uses to buy victuals for the fleet, and dispose of the surplus and refuse, he is not thereby made a trader within the statutes [w]. An infant, though a trader, cannot be made a bankrupt; for an infant can owe nothing but for necessaries: and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due: and no person can be made a bankrupt for debts which he is not liable at law to pay [x]. But a feme covert in London,

Dealing in the funds.

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Infant.

[q] Cro. Car. 31.
[r] Cro. Car. 549. Skinn. 291.
[s] Skinn. 292. 3 Mod. 330.
[t] Cro. Car. 31. Skinn. 292.
[u] 2 P. Wms. 308.
[w] 1 Salk. 110. Skinn. 292.
[x] Lord Raym. 443.

being a sole trader according to the custom, is liable to a commission of bankrupt [y].

2. By what acts a person may become a bankrupt.

2. Having thus considered, who may, and who may not, be made a bankrupt, we are to inquire, secondly, by what *acts* a man may become a bankrupt. A bankrupt is "a trader, who secretes himself, or does certain other acts, tending to defraud his creditors." We have hitherto been employed in explaining the former part of this description, "a trader;" let us now attend to the latter, "who secretes himself, or does certain other acts tending to defraud his creditors." And, in general, whenever such a trader, as is before described, hath endeavoured to avoid his creditors, or evade their just demands, this hath been declared by the legislature to be an act of bankruptcy, upon which a commission may be sued out. For, in this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce, the law is extremely watchful to detect a man, whose circumstances are declining, in the first instance, or at least as early as possible; that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

To learn what the particular acts of bankruptcy are, which render a man a bankrupt, we must consult the several statutes, and the resolutions formed by the courts thereon.
[478] Among these may therefore be reckoned, 1. Departing from the realm, whereby a man withdraws himself from the jurisdiction and coercion of the law, with intent to defraud his creditors [z]. 2. Departing from his own house, with intent to secrete himself, and avoid his creditors [a]. 3. Keeping in his own house, privately, so as not to be seen or spoken with by his creditors, except for just and necessary cause; which is likewise construed to be an intention to defraud his creditors, by avoiding the process of the law [b]. 4. Procuring or suffering himself willingly to be arrested, or outlawed, or imprisoned, without just and lawful cause; which is likewise

[y] *La Vie* v. *Philips*, M. 6 Geo. III. B. R.
[z] Stat. 13 Eliz. c. 7.
[a] Ibid. 1 Jac. I. c. 15.
[b] Stat. 13 Eliz. c. 7.

deemed an attempt to defraud his creditors [c]. 5. Procuring his money, goods, chattels, and effects, to be attached or sequestered by any legal process; which is another plain and direct endeavour to disappoint his creditors of their security [d]. 6. Making any fraudulent conveyance to a friend, or secret trustee, of his lands, tenements, goods, or chattels; which is an act of the same suspicious nature with the last [e]. 7. Procuring any protection, not being himself privileged by parliament, in order to screen his person from arrests; which also is an endeavour to elude the justice of the law [f]. 8. Endeavouring or desiring, by any petition to the king, or bill exhibited in any of the king's courts against any creditors, to compel them to take less than their just debts; or to procrastinate the time of payment originally contracted for; which are an acknowledgment of either his poverty or his knavery [g]. 9. Lying in prison for two months, or more, upon arrest or other detention for debt, without finding bail, in order to obtain his liberty [h]. For, the inability to procure bail, argues a strong deficiency in his credit, owing either to his suspected poverty, or ill character; and his neglect to do it, if able, can arise only from a fraudulent intention; in either of which cases, it is high time for his creditors to look to themselves, and compel a distribution of his effects. 10. Escaping from prison after an arrest for a just debt of 100*l.* or upwards [i]. For, no man would break prison, that was able and desirous to procure bail; which brings it within the reason of the last case. 11. Neglecting to make satisfaction for any just debt to the amount of 100*l.* within two months after service of legal process for such debt, upon any trader having privilege of Parliament [k].

Act of bankruptcy.

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These are the several acts of bankruptcy, expressly defined by the statutes relating to this title: which being so numerous, and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any construction or implication. And, therefore, Sir John Holt held [l], that a man's removing his goods privately to prevent

[c] Ibid. 1 Jac. I. c. 15.
[d] Stat. 1 Jac. I. c. 15.
[e] Ibid.
[f] Stat. 21 Jac. I. c. 19.
[g] Ibid.
[h] Ibid.
[i] Ibid.
[k] Stat. 4 Geo. III. c. 33.
[l] Lord Raym. 725.

Act of bankruptcy.

their being seized in execution, was no act of bankruptcy. For, the statutes mention only fraudulent gifts to third persons, and procuring them to be seized by sham process in order to defraud creditors: but this, though a palpable fraud, yet falling within neither of those cases, cannot be adjudged an act of bankruptcy. So, also, it has been determined expressly, that a banker's stopping or refusing payment is no act of bankruptcy; for it is not within the description of any of the statutes, and there may be good reasons for his so doing, as suspicion of forgery, and the like: and if, in consequence of such refusal, he is arrested, and puts in bail, still it is no act of bankruptcy [m]: but, if he goes to prison, and lies there two months, then, and not before, is he become a bankrupt.

We have seen *who* may be a bankrupt, and what *acts* will make him so. Let us next consider,

3. The proceedings on a commission.

3. The *proceedings* on a commission of bankrupt; so far as they affect the bankrupt himself. And these depend

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entirely on the several statutes of bankruptcy; all which I shall endeavour to blend together, and digest into a concise methodical order.

Petition by creditor.

And, first, there must be a *petition* to the Lord Chancellor by one creditor to the amount of 100*l.*, or by two to the amount of 150*l.*, or by three or more to the amount of 200*l.*; which debts must be proved by *affidavit* [n]: upon which he grants a *commission* to such discreet persons as to him shall seem good, who are then stiled commissioners of bankrupt [o]. The petitioners, to prevent malicious applications, must be bound in a security of 200*l.* to make the party amends in case they do not prove him a bankrupt. And if, on the other hand, they receive any money or effects from the bankrupt, as a recompense for suing out the commission, so as to receive more than their ratable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt. These provisions are made, as well to secure persons in good credit from being damnified by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commission. When the commis-

[m] 7 Mod. 139. [n] Stat. 5 Geo. II. c. 30. [o] 3 Stat. 13 Eliz. c. 7.

sion is awarded and issued, the commissioners are to meet, at their own expense, and to take an oath for the due execution of their commission, and to be allowed a sum not exceeding 20*s.* *per diem* each, at every sitting. And no commission of bankrupt shall abate, or be void, upon any demise of the crown [p].

Adjudicatio.

When the commissioners have received their commission, they are first to receive proof of the person's being a trader, and having committed some act of bankruptcy; and then to declare him a bankrupt, if proved so; and to give notice thereof in the Gazette, and at the same time to appoint three meetings. At one of these meetings an election must be made of assignees, or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of the creditors; which assignees are to be chosen by the major part, in value, of the creditors who shall then have proved their debts; but may be originally appointed by the commissioners, and afterwards approved or rejected by the creditors: but no creditor shall be admitted to vote in the choice of assignees, whose debt on the balance of accounts does not amount to 10*l.* And at the third meeting, at farthest, which must be on the forty-second day after the advertisement in the Gazette (unless the time be enlarged by the Lord Chancellor), the bankrupt, upon notice also personally served upon him, or left at his usual place of abode, must surrender himself personally to the commissioners; which surrender (if voluntary) protects him from all arrests till his final examination is past: and he must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default of either surrender or conformity, shall be guilty of felony without benefit of clergy, and shall suffer death, and his goods and estate shall be distributed among his creditors [q].

Appointment of assignees.

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Surrender of bankrupt.

In case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, he may by warrant from any judge or justice of the peace be apprehended and committed to the county gaol, in order to be forthcoming to the commissioners; who are also empowered immediately to grant a warrant for seizing his goods and papers [r].

[p] Stat. 5 Geo. II. c. 30. [q] Ibid. [r] Ibid.

Examination of bankrupt.

When the bankrupt appears, the commissioners are to examine him touching all matters relating to his trade and effects. They may also summon before them, and examine, the bankrupt's wife[s], and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And in case any of them shall refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison without bail, till they submit themselves and make and sign a full answer; the commissioners specifying in their warrant of commitment the question so refused to be answered. And any gaoler permitting such person to escape or go out of prison, shall forfeit 500*l.* to the creditors[t].

[482] The bankrupt, upon this examination, is bound upon pain of death to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners (except the necessary apparel of himself, his wife, and his children); or, in case he conceals or embezzles any effects to the amount of 20*l.*, or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy; and his goods and estates shall be divided among his creditors[u]. And unless it shall appear that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment of such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off[v].

After the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to *five per cent.* out of the effects so discovered, and such farther reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing

[s] Stat. 21 Jac. I. c. 19.

[t] Stat. 5 Geo. II. c. 30.

[u] Ibid. By the laws of Naples, all fraudulent bankrupts, particularly such as do not surrender themselves within four days, are punished with death; also all who conceal the effects of a bankrupt, or set up a pretended debt to defraud his creditors. (Mod. Un. Hist. xxviii. 320).

[v] Stat. 21 Jac. I. c. 19.

the estate of any bankrupt, after the expiration of the two and forty days, shall forfeit 100*l.* and double the value of the estate concealed, to the creditors [w].

Hitherto every thing is in favour of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigour and severity. For, if the bankrupt hath made an ingenuous discovery (of the truth and sufficiency of which there remains no reason to doubt), and hath conformed in all points to the directions of the law; and if, in consequence thereof, the creditors, or four parts in five of them in number and value, (but none of them creditors for less than 20*l.*), will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the Lord Chancellor: and he, or two of the judges whom he shall appoint, on oath made by the bankrupt that such certificate was obtained without fraud, may allow the same; or disallow it, upon cause shewn by any of the creditors of the bankrupt [x].

Certificate of conformity.

[483]

If no cause be shewn to the contrary, the certificate is allowed of course; and then the bankrupt is entitled to a decent and reasonable allowance out of his effects, for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have a competent sum allowed him, not exceeding *three per cent.*; but if they pay ten shillings in the pound, he is to be allowed *five per cent.*; if twelve shillings and six-pence, then *seven and a half per cent.*; and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent.*; provided that such allowance do not, in the first case, exceed 200*l.*, in the second, 250*l.*, and in the third, 300*l.* [y].

Allowance to bankrupt.

[w] Stat. 5 Geo. II. c. 30.

[x] Ibid.

[y] Ibid. By the Roman law of cession, if the debtor acquired any considerable property subsequent to the giving up of his all, it was liable to the demands of his creditors. (Ff. 42. 3. 4). But this did not extend to such allowance as

Operation of certificate.

Besides this allowance, he has also an indemnity granted him, of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts: and, for that, among other purposes, all proceedings on commissions of bankrupt are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account: though, in general, the production of the certificate, properly allowed, shall be sufficient evidence of all previous proceedings [z]. Thus, the bankrupt becomes a clear man again: and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth; which is the rather to be expected, as he cannot be entitled to these benefits, unless his failures have been owing to misfortunes, rather than to misconduct and extravagance.

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For, no allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed, as before mentioned; and also, if any creditor produces a fictitious debt, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he loses all title to these advantages [a]. Neither can he claim them if he has given with any of his children above 100*l.* for a marriage portion, unless he had at that time sufficient left to pay all his debts; or, if he has lost at any one time 5*l.*, or in the whole, 100*l.* within a twelvemonth before he became bankrupt, by any manner of gaming or wagering whatsoever; or, within the same time, has lost to the value of 100*l.* by stock-jobbing. Also, to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by a commission of bankrupt, or have compounded with their creditors, or have been delivered by an act of insolvency; which is an occasional act, frequently passed by the legislature: whereby all persons whatsoever, who are either in too low a way of dealing to become bankrupts, or not being in a mercantile

Effect of prior bankruptcy, &c.

Insolvent acts.

was left to him on the score of compassion for the maintenance of himself and family. *Si quid misericordiae causâ ei fuerit relictum, puta menstruum vel annuum, alimentorum nomine, non oportet propter hoc bona ejus iterato venundari: nec enim fraudandus est alimentis cottidianis.* (Ibid. l. 6).

[z] Stat. 5 Geo. II. c. 30.

[a] Stat. 24 Geo. II. c. 57.

state of life, are not included within the laws of bankruptcy, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath, at the sessions or assizes; in which case their perjury or fraud is usually, as in case of bankrupts, punished with death. Persons who have been once cleared by any of these methods, and afterwards become bankrupts again, unless they pay full fifteen shillings in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to [485] their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades[b].

Thus much for the proceedings on a commission of bankrupt, so far as they affect the bankrupt himself personally. Let us next consider,

Assignees' title to the estate and property of the bankrupt.

4. How such proceedings affect or transfer the *estate* and *property* of the bankrupt. The method whereby a *real* estate, in lands, tenements, and hereditaments, may be transferred by bankruptcy, was shewn under its proper head in a former chapter[c]. At present, therefore, we are only to consider the transfer of things *personal* by this operation of law.

By virtue of the statutes before mentioned[d], all the personal estate and effects of the bankrupt are considered as vested, by the act of bankruptcy, in the future assignees of his commissioners, whether they be goods in actual *possession*, or debts, contracts, and other choses in *action*; and the commissioners by their warrant may cause any house or tenement of the bankrupt to be broke open, in order to enter upon and seize the same. And when the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them; and the property of every part of the estate is thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it[e].

Assignees' title relates back to the act of bankruptcy.

The property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, be-

[b] Stat. 5 Geo. II. c. 30.
[c] Page 285.
[d] Stat. 1 Jac. I. c. 15. 21 Jac. I. c. 19.
[e] 12 Mod. 324.

fore his debts are satisfied or agreed for. Therefore, it is usually said, that once a bankrupt, and always a bankrupt; by which is meant, that a plain direct act of bankruptcy once committed cannot be purged, or explained away, by any subsequent conduct, as a dubious equivocal act may be[f]; [486] but that, if a commission is afterwards awarded, the commission and the property of the assignees shall have a relation, or reference, back to the first and original act of bankruptcy[g]. Insomuch that all transactions of the bankrupt are from that time absolutely null and void, either with regard to the alienation of his property, or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And, if an execution be sued out, but not served and executed on the bankrupt's effects till after the act of bankruptcy, it is void as against the assignees. But

Crown not bound by bankrupt law.

the king is not bound by this fictitious relation, nor is within the statutes of bankrupts[h]; for, if, after the act of bankruptcy committed, and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby[i]. In France, this doctrine of relation is carried to a very great length; for there, every act of a merchant, for ten days *precedent* to the act of bankruptcy, is presumed to be fraudulent, and is therefore void[k]. But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by statute 19 Geo. II. c. 32, that no money paid by a bankrupt to a *bonâ fide* or real creditor, in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded. Nor, by statute 1 Jac. I. c. 15, shall any debtor of a bankrupt, that pays him his debt, without knowing of his bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader.

The assignees may pursue any *legal* method of recovering this property so vested in them, by their own authority;

[f] Salk. 110.
[g] 4 Burr. 32.
[h] 1 Atk. 262.
[i] Viner, Abr. t. *Creditor and Bankrupt*, 104.
[k] Sp. L. b. 29. c. 16.

but cannot commence a suit in *equity*, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value, at a meeting to be held in pursuance of notice in the Gazette[1]. [487]

When they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after four and within twelve months after the commission issued, give one and twenty days' notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required. And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove, their debts. This dividend must be made equally, and in a ratable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them[3]. Mortgages, indeed, for which the creditor has a real security in his own hands, are entirely safe; for the commission of bankrupt reaches only the equity of redemption[m]. So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution[4]. And,

Dividend.

What priorities are allowed to creditors.

[1] Stat. 5 Geo. II. c. 30.

[m] Finch, Rep. 466.

(3) Where there had been mutual credit between any creditor and the bankrupt, there was much hardship in making the creditor pay the whole of his debt to the assignees, allowing him to receive from them only a dividend upon his demand. The 5 Geo. 2, c. 30, removed this; and it is now provided, that in such cases the commissioners shall state the account, and the balance only shall be paid or claimed on either side. This rule is to prevail in respect of every debt or demand proveable under the commission: and even in cases where the bankrupt had committed an act of bankruptcy before he had contracted the debt, or the credit was given to him, if such credit was given without notice of any act of bankruptcy. (6 Geo. 4, c. 16, s. 50).

(4) When a creditor proves his debt, he states in his deposition either that he has received no security, or what the security is.

If he has a security, and wishes to prove and receive a dividend, he must deliver up the security for the benefit of the creditors, unless it is a joint security from the bankrupt and another person, and then he may receive a dividend upon the whole amount due at the time of the deposition, and may have recourse to the co-surety besides; provided he does not receive more than 20*s.* in the pound for the whole debt. But every security, which the creditor has in his possession, must be exhibited to the commissioners when he proves his debt.

If a creditor proves an aggregate

upon the equity of the statute 8 Ann. c. 14 (which directs, that, upon all executions of goods being on any premises demised to a tenant, one year's rent, and no more, shall, if due, be paid to the landlord), it hath also been held, that, under a commission of bankrupt, which is in the nature of a statute execution, the landlord shall be allowed his arrears of rent to the same amount, in preference to other creditors[5], even though he hath neglected to distrain, while the goods remained on the premises; which he is otherwise entitled to do for his entire rent, be the *quantum* what it may [n]. But, otherwise, judgments and recognizances (both which are debts of record, and therefore at other times have a priority), and also bonds and obligations by deed or special instrument (which are called debts by specialty, and are usually the next in order), these are all put on a level with debts by mere simple contract, and all paid *pari passu* [o]. Nay, so far is this matter carried, that, by the express provision of the statutes [p], debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, shall be proved and paid equally with the rest [q], allowing a discount or drawback in proportion. And insurances, and obligations upon bottomry or *respondentia*, *bond fide* made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy [r 6].

Debts of all degrees paid pari passu.

[488]

[n] 1 Atk. 103, 104.
[o] Stat. 21 Jac. I. c. 19.
[p] Stat. 7 Geo. I. c. 31.
[q] Lord Raymond, 1549. Strange, 1211.
[r] Stat. 19 Geo. II. c. 32.

debt, and states more than one security; for instance, two or more bills or notes; if he receives the value of any one of them in full, so much at the time of the dividend must be deducted from the amount of the debt proved. (Cooke, 195). Where a creditor has a mortgage or pledge, which he thinks insufficient to satisfy the whole of his debt, he may apply to the commissioners, and if they see no objection to the title of the mortgage, they may order it to be sold, and that the produce shall be applied in discharge of the expenses of the sale, and of the mortgagee's debt; and if there be a deficiency, the mortgagee shall be permitted to prove it under the commission. (Order, March 8th, 1794).—[CHRISTIAN.]

(5) This is inaccurately expressed. The landlord's only priority consisted in his right to distrain goods actually on the premises; and now, that right is only allowed to be exercised for the recovery of one year's arrears prior to the fiat. (6 Geo. 4, c. 16, s. 74). In respect of what he fails to recover by distress, the landlord is entitled to prove with the other creditors.

(6) To these may be added annuity

Within eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first [s]. And if any surplus remains, after selling his estates, and paying every creditor his full debt, it shall be restored to the bankrupt [t]. This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily, commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And, if any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence; except that, upon satisfaction made to all the creditors, the commission may be *superseded* [u]. This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled by a commission to do them that justice, which otherwise he wanted to evade. And therefore, though the usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt [w], or his representatives [7].

Final dividend.

Superseding commission.

Interest.

[s] Stat. 5 Geo. II. c. 30.
[t] Stat. 13 Eliz. c. 7.
[u] 2 Ch. Cas. 144.
[w] 1 Atk. 244.

creditors, sureties for the payment of annuity or other debts of the bankrupt, creditors upon contingencies which have not happened at the issuing of the commission, and creditors who have recovered judgments against the bankrupt, in respect of their costs, though those costs have not been taxed at the time of the bankruptcy. All these are entitled to prove according to the calculated value of their claims.

(7) All of the statutes relating to bankruptcy, which were in force when the Commentaries were published, and some that subsequently passed, were repealed by the General Bankruptcy Act, 6 Geo. 4, c. 16, which, though it is still the governing act or code on the subject, has been materially varied by subsequent statutes, viz. the 9 Geo. 4, c. 73, ss. 12, et seq.; 1 Will. 4, c. 7, s. 7; 1 & 2 Will. 4, c. 56; 2 Will. 4, c. 43; c. 53, s. 39; 2 & 3 Will. 4, c. 114; 3 & 4 Will. 4, c. 14, s. 28; c. 47; c. 55, s. 32; c. 74, ss. 55, et seq.; 4 & 5 Will. 4, c. 40, s. 12; c. 79; 5 & 6 Will. 4, c. 29; 6 & 7 Will. 4, cc. 27, 47; 7 Will. 4 & 1 Vict. c. 73, s. 25; 1 & 2 Vict. c. 110; 2 & 3 Vict. cc. 11, 29; 3 & 4 Vict. c. 80; 5 & 6 Vict. c. 122. A few only of the numerous important points in the law of bankruptcy can be comprised within the limits of this note.

1. Who may be bankrupt.—"All bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, and

persons insuring ships or their freight, or other matters, against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, or consignment, or otherwise, in gross or by retail, and all persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities," (6 Geo. 4, c. 16, s. 2); "livery stable-keepers, coach-proprietors, carriers, shipowners, auctioneers, apothecaries, market gardeners, cow-keepers, brick-makers, alum-burners, lime-burners, and millers," (5 & 6 Vict. c. 122, s. 10); are traders within the bankrupt laws: and a married woman, (trading according to the custom of London, (3 Burr. 1776), or during her husband's transportation, (1 Moo. & Sc. 1), feme sole, alien, denizen, (6 Geo. 4, c. 16, s. 135), executor, (3 Madd. 138), clergyman, (1 Atk. 196), public officer, (Id. 306), servant of an ambassador, (7 Ann. c. 12, s. 5), may, by trading, become liable to be made a bankrupt. The trading may be constituted by a very few acts, if they are done with an intent to trade generally, and not (as in the case of a schoolmaster, supplying his pupils with books) with a particular view. (Cowp. 745; 13 Ves. 603; 1 T. R. 34; 1 Deac. 78). Infants, and, (with the exception above-mentioned), married women, are not liable to become bankrupts; and "no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member or subscriber to any *incorporated* commercial or trading companies, established by charter or act of Parliament, (see 2 Mon. D. & De G. 758), shall be deemed, as such, a trader, liable to become bankrupt." (7 Geo. 4, c. 16, s. 2).

2. By what acts a man may become bankrupt.—"If any such trader shall depart this realm, or being out of this realm, shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution, or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, he shall be deemed to have committed an act of bankruptcy." (6 Geo. 4, c. 16, s. 3). "Provided that a conveyance of all a trader's estate and effects for the benefit of all his creditors, if executed by the trustee or trustees, and attested and advertised as required by the act, shall not be an act of bankruptcy unless the fiat issue within six months." (Id. s. 4). "If any such trader, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall, upon such or any other arrest or commitment for debt, or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days, or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader, having been arrested, com-

mitted, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention." (6 Geo. 4, c. 16, s. 5). The 5th section of the 6 Geo. 4, c. 16, provided a voluntary act of bankruptcy, by filing a declaration of insolvency at the bankrupt office, to be duly advertised in the London Gazette; the fiat founded upon which must issue within two months. (See now 5 & 6 Vict. c. 122, s. 22, which requires such declaration to be attested by an attorney or solicitor, and does not require it to be advertised in the Gazette). By sect. 8, a trader against whom a docket has been struck, commits an act of bankruptcy by compounding with the petitioning creditor. Sect. 10 enacts, that if a creditor of a trader having privilege of Parliament, file an affidavit of debt, and sue out a writ of summons, and the debtor do not enter an appearance, and pay or compound the debt to the satisfaction of the creditor, this shall be an act of bankruptcy; as also shall be disobedience, by such a trader, of a peremptory order of a court of equity, or in lunacy or bankruptcy, for payment of money. (Id. s. 11).

By the 1 & 2 Vict. c. 110, s. 8, if any single creditor or any two partners, whose debt amounts to 100*l.*, or any two creditors whose debts amount to 150*l.*, or any three or more whose debts amount to 200*l.*, file an affidavit of such debt or debts in the court of bankruptcy, and serve the bankrupt with a copy of such affidavit, and a notice requiring immediate payment; and the trader do not within twenty-one days pay, secure, or compound for the debt, or enter into a bond, with two sureties (to be approved by a commissioner in bankruptcy), to pay such sum or sums as shall be recovered by action, with costs, or to render himself; such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after the service of the affidavit and notice, provided the fiat issue within two months from the filing of the affidavit.

By the Insolvent Act, 7 Geo. 4, c. 57, the filing of a petition to take the benefit of the act was declared an act of bankruptcy, provided the adjudication in bankruptcy followed before the hearing of the petition or within two months from the filing of it. Further provisions on the subject of this enactment are contained in the stat. 1 & 2 Vict. c. 110, ss. 39, 40.

Lastly, by the stat. 5 & 6 Vict. c. 122, ss. 11—21, the Court of Bankruptcy in London, or in the district where the debtor resides, on a creditor's affidavit of debt and demand, may summon the trader to admit or deny the debt; and if he make default without lawful excuse, or refuse to admit the debt, or to swear that he believes he has a good defence, and do not, within fourteen days, or other period to be allowed him, pay, secure, or compound for the demand to the creditor's satisfaction, or enter into a bond, with two sureties, to answer the result of an action, he shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of the summons, provided the fiat issue within two months from the filing of the affidavit; and if he sign an admission of the demand in a prescribed form, and do not pay, secure, or compound for the same within fourteen days; or if he admit part of the demand, and do not depose to his having a good defence to the residue, and do not pay, &c., or enter into such bond, this shall be an act of bankruptcy on the fifteenth day after service of the summons; or if a trader do not pay, secure, or compound for a judgment debt on which the plaintiff might sue out execution, within fourteen days after personal service of a written demand of payment, this shall be an act of bankruptcy on the

fifteenth day after such service; provided execution be not in the mean time restrained by a court having jurisdiction. Or if a trader disobey an order of a court of equity, or in bankruptcy or lunacy, for payment of money, this shall be an act of bankruptcy on the fifteenth day after personal service of the order.

Formerly a fiat might have been set aside on the ground of *concert;* and an act of bankruptcy *concerted* between the bankrupt and the petitioning creditor could not have been relied upon to support a fiat against any person who was no party to the concert. (4 B. & Ad. 508). But this ground of objection, either to the fiat, or to the act of bankruptcy, can no longer be taken. (1 & 2 Will. 4, c. 56, s. 42; 5 & 6 Vict. c. 122, s. 8).

No act of bankruptcy can now be made the foundation of a fiat after the lapse of a year. (5 & 6 Vict. c. 122, s. 7).

3. Who may proceed against a bankrupt.—The minimum qualification of the petitioning creditor or creditors, is now fixed at a debt of 50*l.*, owing to a single creditor or firm, 70*l.* owing to two distinct creditors, and 100*l.* to three or more creditors. This debt may be payable in futuro, but must be a legal debt, and must also belong beneficially and exclusively to the petitioning creditor or creditors, (1 Atk. 147; 1 Gl. & J. 197; Mont. 132), and must have been contracted or subsisting during the trading, and before an act of bankruptcy; which latter, however, may have been committed after the trading. (2 Moo. & Sc. 193; 2 Car. & P. 91). As to suing out a separate fiat against one or more members of a firm, upon a debt due from the firm, see 6 Geo. 4, c. 16, s. 16. The 6 Geo. 4, c. 16, s. 18, provides a remedy, in certain cases, for the petitioning creditor's debt being found insufficient after adjudication; and by the 5 & 6 Vict. c. 122, s. 4, if he do not open the fiat in due time, another may be appointed.

4. The method of proceeding.—In matters of form, accuracy and fulness of detail are essential, and the student must refer to the statutes and books of practice for information on this subject. It will be sufficient to mention, that the creditor takes the first step by making an affidavit of the amount of his debt, and executing a bond, with a condition to be void if he prove the debt and act of bankruptcy, and duly proceed on the fiat; the benefit of which bond, in case of breach, the Lord Chancellor may appropriate to the satisfaction of the party injured. (6 Geo. 4, c. 16, s. 16). But, by 5 & 6 Vict. c. 122, s. 3, the Lord Chancellor is empowered to dispense with the bond. If the act of bankruptcy sworn to is not proved, any other act, prior to the fiat, will be sufficient. (6 Mau. & S. 312). Upon delivery of the affidavit and bond at the bankrupt office, an entry is made in the docket book; and thus "a docket" is "struck" against the trader.

Upon petition by the creditor to the Lord Chancellor, the *fiat* (which is an authority to the petitioner to prosecute his complaint in the court of bankruptcy, substituted by the 1 & 2 Will. 4; c. 56, for the *commission*) issues from the Court of Chancery; and this fiat, as soon as it is recorded in the court of bankruptcy, any commissioner of bankrupts may proceed to carry into execution.

The court of bankruptcy was created by the statute 1 & 2 Will. 4, c. 56, which authorized the Crown to appoint a chief and three puisne judges, and six commissioners, to be a court of record of law and equity. The judges constitute the *Court of Review.* The number of judges was reduced to three by the 5 & 6 Will. 4, c. 29; and the 5 & 6 Vict. c. 122, s. 64, declares, that the Court of

Review may be constituted (as it now is) by a single judge. The six commissioners form the *court of bankruptcy*, and may be formed, when needful, into two *subdivision courts*, for the determination of matters of difficulty which may occur before a commissioner sitting alone. The judges have all the powers which are given to commissioners. Questions of law or equity, or of the admission or rejection of evidence, may be brought by appeal before the Court of Review, and the decisions of that court, on questions of law or equity, are subject to an appeal to the Lord Chancellor. Fiats to be executed in the country were formerly directed to commissioners, who were not invested with all the powers of the members of the court of bankruptcy; but under the stat. 5 & 6 Vict. c. 122, district courts of bankruptcy have been established upon a footing similar to that of the court of commissioners in London.

After proof of the petitioning creditor's debt, the trading, and the act of bankruptcy, the trader is *adjudged* bankrupt, and such adjudication is immediately notified to the bankrupt, and, if not successfully disputed by him and annulled, is advertised in the London Gazette; in which advertisement the commissioners also appoint two public meetings for the bankrupt to surrender and conform. (See 5 & 6 Vict. c. 122, ss. 23, 24, 33). After the adjudication, and sometimes immediately upon the filing of the fiat, possession is taken of the bankrupt's estate and effects by a *messenger* of the court, under a warrant of seizure. At these and subsequent meetings, the creditors prove their debts; and at one of the meetings appointed by the commissioners, assignees of the bankrupt's estate and effects are chosen by the major part in value of the creditors who have then proved debts to the amount of at least 10*l.* each. Upon the *appointment* by the court of the assignees thus chosen, the estate and effects of the bankrupt immediately vest in them, as has been elsewhere noticed. (Ante, p. 286, n.). In addition to the creditors' assignees, there is a permanent body of official assignees, being merchants or accountants, appointed by the Lord Chancellor; (1 & 2 Will. 4, c. 56, s. 22, and 5 & 6 Vict. c. 122, s. 48); and one of such official assignees is in every case joined with the creditors' assignees, and is alone the hand to receive the personal estate, and the profits and proceeds of the general estate of the bankrupt, and to pay such proceeds into the Bank of England, to the credit of the accountant-general in bankruptcy. The assignees call meetings, and manage the affairs generally for the benefit of the creditors; and, until the appointment of the creditors' assignees, the official assignee supplies their place.

The bankrupt is bound to surrender himself within sixty days at furthest from the advertisement in the London Gazette, unless the time is specially enlarged. If he fail to surrender after due notice, or, upon his examination, to discover all his estate, and deliver up such part as may be in his possession or power (except the necessary wearing apparel of himself and family), or if he conceal any part of his estate to the value of 10*l.*, or any writings relating thereto, with a fraudulent intention, he is guilty of felony, and liable to transportation for not less than seven years, or to imprisonment with or without hard labour for not more than seven years. He is liable to be called up for examination at any time, upon pain of being committed to prison without bail, until he conform; and his wife, and all persons known or suspected to be in possession of his estate, or of any information relating thereto, are subject to the same obligation. The bankrupt is also punishable with imprisonment for not more than three years if he have made any fraudulent entry in, or erasure or destruction of, any books or

documents after an act of bankruptcy; and if, within three months before his bankruptcy, under the false colour of carrying on business, and dealing in the ordinary course of trade, and with intent to defraud the owner, he obtain on credit any goods, or remove, conceal, or dispose of any goods so obtained, he is liable to imprisonment for not more than two years, with or without hard labour. (5 & 6 Vict. c. 122, ss. 34, 35).

If the bankrupt conform to the law, he will obtain a *certificate* of such conformity (to which the creditors are not now required to assent); after this certificate has been allowed at a public sitting of the court, where every creditor has an opportunity of opposing such allowance, and been confirmed (upon the bankrupt's oath of the absence of any fraud) by the Court of Review, where again creditors may be heard in opposition, he is discharged, both as to his person and as to all property thenceforth acquired, from all debts and demands proveable under the fiat; (5 & 6 Vict. c. 122, ss. 37, 38, 39); and is also entitled, out of his estate, to a decent allowance for maintenance, the amount of which is regulated in some measure by his past conduct and the amount of the dividends payable upon his debts. (5 & 6 Vict. c. 122, s. 44).

5. The rights of the creditors through the assignees.—The effect of the appointment of the assignees in transferring the bankrupt's property, and some points as to protected transactions, have been noticed in a preceding page. (p. 286, n. (44)). A few particulars remain to be mentioned. The assignees' title is not confined to the bankrupt's own property; for, by 6 Geo. 4, c. 16, s. 72, "If any bankrupt, at the time he becomes bankrupt, shall *by the consent and permission of the true owner thereof* have in his *possession, order, or disposition* any *goods or chattels*, whereof he was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition *as owner*," the same may be sold and disposed of for the benefit of the creditors. This enactment does not extend to chattels real, nor (with some exceptions founded on cases which are not quite reconcileable) to fixtures to the freehold, though removeable by the tenant. (See 2 Nev. & M. 238; 2 Mon., D., & De G. 712, 725). In order to take debts and equitable property assigned by a trader out of his reputed ownership, it is necessary that notice of the assignment should be given to the creditor or trustee. (3 Mon., D., & De G. 140; 2 Hare, 249; 2 Scott, N. R., 266).

The assignees' title relates back to the date of the act of bankruptcy (except as against the crown), and includes all property then, or at any time subsequently until the passing of the bankrupt's certificate, belonging to the bankrupt, or in his reputed ownership; but with various important exceptions, some of which are mentioned in the note above referred to. Some transactions, even prior to the act of bankruptcy, are liable to be overreached by the assignees' title: such are voluntary judgments, (ante, p. 286, n.), every voluntary settlement or gift made by an insolvent trader to his children or others, every execution on the trader's goods procured by himself, and every fraudulent conveyance or transfer intended to defeat or delay his creditors. (6 Geo. 4, c. 16, s. 73; 13 Eliz. c. 5; 8 Ves. 195; 11 East, 256).

At or within six months after the sitting appointed for the last examination of the bankrupt, the court publicly audits the assignees' accounts, and, at the same or a subsequent sitting, declares a dividend; and if the estate is not wholly divided in the first dividend, a second dividend is to be made within eighteen months from the date of the fiat. The first dividend is to be made within the last eight months of the

year following the fiat. These dividends are made at public meetings convened by twenty-one days' notice in the Gazette. (6 Geo. 4, c. 16, ss. 106, 117; 5 & 6 Vict. c. 122, s. 27). The second dividend is final, except as to property not then come to the hands of the assignees, and available.

Title by Insolvency.

This is a title which has grown into importance subsequently to the publication of the Commentaries.

By a statute still in force, called *The Small Debtors' Act*, (48 Geo. 3, c. 123), prisoners in execution upon judgment of any court, whether of record or not, for any debt or damages not exceeding 20*l.*, exclusive of costs, are entitled to be thereupon discharged after having lain in prison for an entire year, by a rule to be obtained upon application in term time to one of the superior courts. (See 4 Dowl. P. C. 5, 320, 595; 2 Mee. & W. 311).

The acts for the relief of prisoners for debt to a larger amount, were accompanied by provisions for a *cessio bonorum* for the general benefit of the creditors, somewhat similar to the provisions of the Bankrupt Law. By the stat. 32 Geo. 2, c. 28, (called the Lords' Act), provision was made for the discharge of prisoners in execution for sums not exceeding 100*l.* (extended by 33 Geo. 3, c. 5, to 300*l.*), upon petition and cession of their real and personal estate, and also for enabling the creditors of such prisoners, after they should have remained in prison for three months, to oblige them to discover on oath and to deliver up their real and personal estate for the benefit of the creditors,—provisions which are now suspended by the stat. 1 & 2 Vict. c. 110, s. 119. Other acts were from time to time passed for the relief of insolvent prisoners; but the basis of the system in the comprehensive form in which it now exists was laid by a temporary act introduced by Lord Redesdale, (53 Geo. 3, c. 102), which was followed from time to time by other temporary statutes of a similar character, (54 Geo. 3, c. 23; 56 Geo. 3, c. 102; 1 Geo. 4, c. 119; 3 Geo. 4, c. 123; 5 Geo. 4, c. 61; 7 Geo. 4, c. 57; see 3 & 4 Will. 4, c. 47). The system introduced by these statutes was placed on a permanent footing by the stat. 1 & 2 Vict. c. 110, (amended by 2 & 3 Vict. c. 39), a statute by which arrest on mesne process (unless by a judge's order, founded on affidavit, shewing a probability that the debt will be lost by the debtor's flight) was abolished, and by which the remedies of judgment creditors against their debtors' property were improved.

The relief is administered by a court of record called "The Court for the Relief of Insolvent Debtors," which consists of four judges, styled commissioners. One commissioner remains in London, and three of the commissioners are to make circuits through England and Wales, three times a year, if necessary.

The prisoner, wishing for his discharge, applies to the court by petition, which, after a fortnight has elapsed from the commencement of his imprisonment can only be by leave of the court. On the other hand, after three weeks from the execution against the person, the execution creditor, being unpaid, may petition the court for an order by means of which the property of the prisoner may be applied in the same manner as if he had petitioned for his discharge.

The order made upon the petition, either of the prisoner or the creditor, is a *vesting order*, which vests all the real and personal estate of the prisoner, both at home and abroad, and all his future real and personal estate and rights which may be acquired by him before he becomes entitled to his final discharge, in the *provisional assignee* for the time being of the estates and effects of insolvent debtors in England.

The vesting order is recorded in the court, and due notice of it is published. The wearing apparel, bedding, working tools, and other necessaries of the prisoner and his family, to the extent of 20*l.*, are excepted out of the effect of the order, and the prisoner may apply to the court for an allowance for his support during his imprisonment, and for the expense of making out and filing his schedule of his assets and liabilities. The court afterwards appoints a particular assignee or assignees of the prisoner's estate and effects, in whom, upon acceptance of the appointment, (which is recorded), the estate, effects, rights, and powers of the prisoner, before vested in the provisional assignee, immediately vest. The appointment is duly notified; and neither it nor the vesting order will bind lands in a register county as against a purchaser for value without notice, who has first registered his conveyance, unless registered within two months. The assignees take all powers of appointment, and the powers and rights which the prisoner may exercise for his own benefit, (except the unsaleable right of appointing to a vacant benefice). Where the prisoner is a beneficed clergyman, the income of his benefice does not vest in the assignees, who can only reach it, as any creditor may do, by a sequestration; nor does the pay or pension of a military, naval, or civil officer vest in his assignees; but the court is authorized, with the consent of the head of the department in the public service to which the prisoner belongs, to appropriate a portion of it for the benefit of the creditors. The assignees may decline to accept any lease belonging to the prisoner; and, if they do not declare their option, the landlord may apply to the court to compel them, either to accept or to give up the lease and the possession. If they accept it, the prisoner is discharged from the rent and covenants. The corresponding enactment in the Bankrupt Act, it will be remembered, enables the bankrupt to deliver up the lease, but gives the landlord no right of interference. Goods in the reputed ownership of the prisoner at the commencement of his imprisonment vest in the assignee by virtue of a clause similar to that in the Bankrupt Act; and any voluntary charge, conveyance, delivery, or assignment of his real or personal property by the prisoner, being in insolvent circumstances, made either within three months before his imprisonment, or with an intent to take the benefit of the act, is declared fraudulent and void as against his assignees. There is also a provision against executions, after the imprisonment, under previous warrants of attorney or cognovits, which is similar to that contained in the Bankrupt Act, (6 Geo. 4, c. 16, s. 108), but is not qualified as the latter clause has been, by the 1 Will. 4, c. 7, s. 7, (ante, p. 286, n.), in favour of executions on cognovits given in adverse actions. Warrants of attorney and cognovits not duly filed in the Queen's Bench under the stat. 3 & 4 Geo. 4, c. 39, (amended by 6 & 7 Vict. c. 66), are declared fraudulent and void against the assignees. (1 & 2 Vict. c. 110, s. 60).

The assignees' duties are, to get in and realise the prisoner's estate, ascertain the debts, and declare a dividend. Within fourteen days, or other time to be allowed by the court, the prisoner is required to give into court a schedule under his hand of his debts, payable in præsenti or in futuro, and of his estate and effects, rights, and powers, vested in himself, or in any person or persons in trust for him; such schedule to contain a balance sheet of so much of his receipts and expenditure as shall be required by the court. The court then appoints a day, (which must be within four months), for bringing the prisoner before the court, (or the commissioner on circuit), on which day his schedule is examined and his creditors are al-

lowed an opportunity to cross-examine him and oppose his discharge on grounds of past misconduct, which may be such as to authorize the court to postpone his discharge for six months, two, or even three years, but with an allowance of not more than 4*s.* per week from the detaining creditor. If the prisoner's conduct has been satisfactory, he is adjudged to be discharged and entitled to the benefit of the act. He may obtain his discharge at an earlier period on procuring sufficient sureties for his appearance.

By his discharge the prisoner is released from any future suit or execution against his person in respect of any of the debts, present or future, existing at the date of the vesting order, to the several persons named in his schedule as creditors or as claiming to be creditors, or to indorsees of any negotiable security set forth in the schedule. But, previously to his discharge, the prisoner is required to execute a warrant of attorney to confess a judgment (with the force of a recognizance) to his assignees for the amount of the debts, under which judgment the court is at any future time authorized to direct execution to issue against any after-acquired property of the insolvent for the benefit of his creditors: and he is also liable to be examined on oath at any time as to his estate and effects, and to be ordered to make over to his assignees such property as the judgment may not enable them to reach.

Imprisonment is the foundation of the jurisdiction of the Insolvent Debtors' Court; but the stat. 5 & 6 Vict. c. 116, has introduced a new principle into our law, and enables any person, not being a trader, (or, if he be a trader, owing in the whole less than 300*l.*), after due advertisement of his intention, to present a petition to the Court of Bankruptcy for protection from process, with a schedule of his debts, credits, and assets; whereupon the judge or commissioner may grant a protection of the petitioner's person from all process, except arrest under a judge's order, at the same time appointing an official assignee, in whom his estate is to be vested. The petitioner is then to be examined on oath before the commissioner in rotation, and if the result is satisfactory, he obtains a final order for protection from all process, and for the vesting of his estate and effects, present and future, in an official assignee jointly with an assignee to be chosen by the creditors, which assignees are to be entitled to his estate and effects in the same manner as if he had been a bankrupt and they had been assignees under his fiat. There are special provisions for vesting the future estate of the insolvent from time to time in his assignees; so that the insolvent's future property is not protected by his final discharge under this act, as that of a bankrupt is by his certificate.

The present mode of administering the act is much complained of, as not providing for sufficient notice to creditors and as affording too great facilities to fraudulent debtors.

CHAPTER XXXII.

OF TITLE BY TESTAMENT AND ADMINISTRATION.

XI. & XII. Title by will or administration.

THERE yet remain to be examined, in the present chapter, two other methods of acquiring personal estates, viz. by *testament* and *administration*. And these I propose to consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

Subject divided.

XI., XII. In the pursuit then of this joint subject, I shall, first, inquire into the original and antiquity of testaments and administrations; shall, secondly, shew who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and its incidents; shall, fourthly, shew what an executor and administrator are, and how they are to be appointed; and, lastly, shall select some few of the general heads of the office and duty of executors and administrators.

First, the origin and history of wills and administrations.

First, as to the *original* of testaments and administrations. We have more than once observed, that when property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it; which introduced the doctrine and practice of alienations, gifts, and contracts. But these precautions would be very short and imperfect, if they were confined to the life only of the occupier; for then upon his death all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and, in defect of such appointment or nomination, or where

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no nomination is permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons [a]. The former method of acquiring personal property, according to the express directions of the deceased, we call a *testament*: the latter, which is also according to the will of the deceased, not expressed indeed but presumed by the law [b], we call in England an *administration*; being the same which the civil lawyers term a succession *ab intestato*, and which answers to the descent or inheritance of real estates.

Antiquity of testaments.

Testaments are of very high antiquity. We find them in use among the ancient Hebrews; though I hardly think the example usually given [c], of Abraham's complaining [d] that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive to shew that he had made him so by *will*. And indeed a learned writer [e] has adduced this very passage to prove, that, in the patriarchal age, on failure of children, or kindred, the servants born under their master's roof succeeded to the inheritance as heirs at law [f]. But (to omit what Eusebius and others have related of Noah's testament, made in *writing* and witnessed under his *seal*, whereby he disposed of the whole world [g]), I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings [h], wherein Jacob bequeaths to his son Joseph a portion of his inheritance double to that of his [491] brethren: which will we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens [i]; but in many other parts of Greece they were totally discountenanced [k]. In Rome they were unknown, till the laws of the twelve tables were compiled,

[a] Puff. L. of N. b. 4. c. 10.
[b] Ibid. b. 4. c. 11.
[c] Barbeyr. Puff. 4. 10. 4. Godolph. Orph. Leg. 1. 1.
[d] Gen. c. 15.
[e] Taylor's Elem. Civ. Law, 517.
[f] See page 12.
[g] Selden. de Succ. Ebr. c. 24.
[h] Gen. c. 48.
[i] Plutarch. in vitâ Solon.
[k] Pott. Antiq. l. 4. c. 15.

which first gave the right of bequeathing[l]: and, among the northern nations, particularly among the Germans[m], testaments were not received into use. And this variety may serve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state[n]; which has permitted it in some countries, and denied it in others: and, even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven[o].

Testamentary power in England.

With us in England this power of bequeathing is coeval with the first rudiments of the law: for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. "*Sive quis incuriâ, sive morte repentinâ, fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (praeter eam quae jure debetur hereoti nomine) sibi assumito. Verum possessiones uxori, liberis, et cognatione proximis, pro suo cuique jure, distribuantur*[p]." But we are not to imagine, that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil will inform us[q], that by the common law, as it stood in the reign of Henry the second, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal: or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but, if he died without either wife or issue, the whole was at his own disposal[r]. The shares of the wife and children were called their *reasonable* parts; and the writ *de rationabili parte bonorum* was given to recover them[s].

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Reasonable parts of widow and children.

This continued to be the law of the land at the time of

[l] Inst. 2. 22. 1.
[m] Tacit. de mor. Germ. 21.
[n] See p. 13.
[o] Sp. L. b. 27. c. 1. Vinnius in Inst. l. 2. tit. 10.
[p] LL. Canut. c. 68.
[q] L. 2. c. 5.
[r] Bracton, l. 2. c. 26. Flet. l. 2. c. 57.
[s] F. N. B. 122.

magna carta, which provides, that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased: and, if nothing be owing to the crown, "*omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partibus suis* [t]." In the reign of king Edward the third, this right of the wife and children was still held to be the universal or common law [u]; though frequently pleaded as the local custom of Berks, Devon, and other counties [w]: and Sir Henry Finch lays it down expressly [x], in the reign of Charles the first, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now, by will, bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration began. Indeed, Sir Edward Coke [y] is of opinion, that this never was the general law, but only obtained in particular places by special custom: and to establish that doctrine, he relies on a passage in Bracton, which, in truth, when compared with the context, makes directly against his opinion. For Bracton [z] lays down the doctrine of the reasonable part to be the common law; but mentions that as a particular exception, which Sir Edward Coke has hastily cited for the general rule. And Glanvil, *magna carta*, Fleta, the year-books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law [1]: which also continues to this day to be the general law of our sister kingdom of Scotland [a]. To which we may add, that, whatever may have been the custom of later years in many parts

Power to bequeath by will the whole of personal estate as testator may please.

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The same law in province of York, Wales, and London, by statutes.

[t] 9 Hen. III. c. 18.

[u] A widow brought an action of detinue against her husband's executors, *quod cum per consuetudinem totius regni Angliae hactenus usitatam et approbatam, uxores debent et solent a tempore, &c., habere suam rationabilem partem bonorum maritorum suorum: ita videlicet, quod si nullos habuerint liberos, tunc medietatem; et si habuerint, tunc tertiam partem, &c.*; and that her husband died worth 200,000 marks, without issue had between them; and thereupon she claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the husband's dying without issue was denied; but the rule of law, as stated in the writ, seems to have been universally allowed. (M. 30 Edw. III. 25). And a similar case occurs in H. 17 Edw. III. 9.

[w] Reg. Brev. 142. Co. Litt. 176.

[x] Law. 175.

[y] 2 Inst. 33.

[z] L. 2. c. 26. § 2.

[a] Dalrymp. of Feud. Property, 145.

(1) See, however, Somner, Gavelk. 9; Harg. Co. Litt. 176. b., n. 6.

of the kingdom, or however it was introduced in derogation of the old common law, the antient method continued in use in the province of York, the principality of Wales, and in the city of London, till very modern times: when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes have been provided; the one 4 & 5 W. & M. c. 2, explained by 2 & 3 Ann. c. 5, for the province of York[2]; another 7 & 8 W. III. c. 38, for Wales; and a third, 11 Geo. I. c. 18, for London: whereby it is enacted, that persons, within those districts, and liable to those customs, may (if they think proper) dispose of *all* their personal estates by will; and the claims of the widow, children, and other relations to the contrary, are totally barred[3]. Thus is the old common law now utterly abolished throughout all the kingdom of England, and a man may devise the whole of his chattels as freely as he formerly could his third part or moiety. In disposing of which, he was bound by the custom of many places (as was stated in a former chapter[b]) to remember his lord and the church, by leaving them his two best chattels, which was the original of heriots and mortuaries; and afterwards he was left at his own liberty, to bequeath the remainder as he pleased.

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In case of intestacy, the personal property vested in ordinary.

In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such cases, it is said, that by the old law the king was entitled to seise upon his goods, as the *parens patriae*, and general

[b] Page 426.

(2) The stat. 4 & 5 W. & M. c. 2, excepts the cities of Chester and York from its operation; and the stat. 2 & 3 Ann. repeals this exception only in respect of York. The exception, in the former act, which arose out of a mistake of the Legislature, has misled Mr. Hargrave (Co. Litt. 176. b., n. 5) into the error of supposing that the old custom still exists in respect of Chester. The *custom* of the province of York of course existed only in those places which had immemorially belonged to the province; whereas Chester was originally part of the diocese of Lichfield and Coventry, within the province of Canterbury, and was annexed to the province of York by the stat. 33 Hen. 8, c. 31; see 3 Ves. 338. Whatever customs may have formerly existed in restraint of the testamentary power, have at all events been abolished by the stat. 7 Will. 4 & 1 Vict. c. 26.

(3) But in case of intestacy at law the customs of those places still operate, there being a special provision to save them in that case. Co. Litt. 176. b., n. 5, 178. b., n. 9.

trustee of the kingdom [c]. This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron, and other courts, or to have their wills there proved, in case they made any disposition [d]. Afterwards the crown, in favour of the church, invested the prelates with this branch of the prerogative: which was done, saith Perkins [e], because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased [4]. The goods therefore of intestates were given to the ordinary by the crown; and he might seise them, and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money *in pios usus:* and if he did otherwise, he broke the confidence which the law reposed in him [f]. So that, properly, the whole interest and power which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious [g]. And, as he had thus the disposition of intestates' effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the [495]

[c] 9 Rep. 38. [d] Ibid. 37. [e] § 486.
[f] Finch. Law. 173, 174. [g] Plowd. 277.

(4) See Bac. Ab. *Executors*, (E), 1; Gilb. Rep. 203; 1 Lev. 158, 186; 1 Reeves's Hist. Engl. Law, 73. There seems to be little doubt that the Crown never had the jurisdiction or prerogative here attributed to it; and that where the king exercised such a power, he did so, in common with many of his subjects, only within his own demesne, as lord; and consequently that it was from the feudal superior, not from the parens patriæ, that this jurisdiction passed into the hands of the ecclesiastics.

reverend prelates were therefore not accountable to any, but to God and themselves, for their conduct [h]. But even in Fleta's time it was complained [i], "*quod ordinarii, hujusmodi bona nomine ecclesiae occupantes, nullam vel saltem indebitam faciunt distributionem.*" And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of Pope Innocent IV.[k], written about the year 1250; wherein he lays it down for established canon law, that "*in Britanniâ tertia pars bonorum decedentium ab intestato in opus ecclesiae et pauperum dispensanda est.*" Thus the popish clergy took to themselves [l] (under the name of the church and poor) the whole residue of the deceased's estate, after the *partes rationabiles*, or two thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason, it was enacted by the statute of Westm. 2.[m], that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will: a use more truly pious, than any *requiem*, or mass for his soul [5]. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands; yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents: and therefore the statute 31 Edw. III. c. 11, provides, that, in case of intestacy, the ordinary shall depute the nearest and

The ordinary, by statute Westm. 2, was bound to pay debts of intestate.

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The 31 Edw. 3, c. 11, compels ordinary to grant

[h] Plowd. 277.

[i] L. 2. c. 57. § 10.

[k] in Decretal. l. 5. t. 3. c. 42.

[l] The proportion given to the priest, and to other pious uses, was different in different countries. In the archdeaconry of Richmond, in Yorkshire, this proportion was settled by a papal bulle, A. D. 1254, (Regist. honoris de Richm. 101.), and was observed till abolished by the statute 26 Hen. VIII. c. 15.

[m] 13 Edw. I. c. 19.

(5) This statute was held to be merely declaratory of the common law on this subject. *Snelling's Case*, Rep. 83.

most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand[6]; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the *next and most lawful friend* of the intestate; who is interpreted[n] to be the *next of blood* that is under no legal disabilities. The statute 21 Hen. VIII. c. 5, enlarges a little more the power of the ecclesiastical judge; and permits him to grant administration *either* to the widow, *or* the next of kin, *or* to both of them, at his own discretion; and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

administration to nearest and most lawful friends of deceased.

The 21 Hen. 8, c. 5, authorizes to grant to widow or next of kin or both.

Upon this footing stands the general law of administrations at this day. I shall, in the farther progress of this chapter, mention a few more particulars, with regard to who may, and who may not, be administrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only serving to shew the original and gradual progress of testaments and administrations; in what manner the latter was first of all vested in the bishops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular persons nominated expressly by the law.

I proceed now, *secondly*, to inquire who may, or may not, make a testament; or what persons are absolutely obliged by law to die intestate. And this law[o] is entirely prohibitory; for, regularly, every person hath full power and liberty to make a will, that is not under some special prohibition by law or custom: which prohibitions are principally upon three accounts; for want of sufficient discretion; for want of sufficient liberty and free will; and on account of their criminal conduct[6].

Secondly, who cannot make a will.

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[n] 9 Rep. 39. [o] Godolph. Orph. Leg. p. 1. c. 7.

(6) The new law respecting wills has been already stated, (ante, p. 379, n.)

1. Infants, lunatics, and idiots.

1. In the first species are to be reckoned infants, under the age of fourteen if males, and twelve if females; which is the rule of the civil law[p]. For, though some of our common lawyers have held that an infant of any age (even four[7] years old) might make a testament[q], and others have denied that under eighteen he is capable[r], yet, as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age: but if the testator was not of sufficient discretion, whether at the age of fourteen or four-and-twenty, that will overthrow his testament. Madmen, or otherwise *non compotes*, idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness—all these are incapable, by reason of mental disability, to make any will so long as such disability lasts[8]. To this class also may be referred such persons as are *born* deaf, blind, and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having *animum testandi*, and their testaments are therefore void[9].

[p] Godolph. p. 1. c. 8. Went. 212. 2 Vern. 104. 469. Gilb. Rep. 71.

[q] Perkins. § 503.

[r] Co. Litt. 89.

(7) This has been thought an error of the press in Perkins, and that four by mistake was printed for fourteen. See this subject particularly investigated by Mr. Hargrave, who concludes with the learned Judge, that a will of personal estate may be made by a male at the age of fourteen, and by a female at the age of twelve, and not sooner. (Harg. & Butl. Co. Litt. 89. b., n. 6; Toller, 8.—[CHRISTIAN.] An infant cannot now make a will for any purpose. 7 Will. 4 & 1 Vict. c. 26, s. 7).

(8) If a testator be subject to insanity, a will made during a clear lucid interval will be established. (4 Rep. 123 b; 3 Hagg. 275; 1 Phillim. 90; 5 Russ. 166).

(9) The circumstance of false reading, misrepresentation, concealment, or promise by a devisee to do that which the testator proposed to do by a new will, thereby inducing him not to make one, or any species of fraud practised upon the testator, may invalidate or extend or alter the operation of a will, either wholly or in part, according to the nature of the transaction; and the court of Chancery will supply omissions procured in this way, when the facts are clearly established. (See Eq. Abr. 764; 2 Id. 43; 2 P. Wms. 287; 2 Vern. 506; Pre. Cha. 3; 2 Eq. Ca. Ab. 43; 2 Ves. sen. 408; 3 Ves. J. 152, 402, 412, 416; 1 Jac. 466; 3 Meriv. 161; 1 Dow. & Cl. 85; 2 Hagg. 179).

2. Such persons, as are intestable for want of liberty or freedom of will, are by the civil law of various kinds; as prisoners, captives, and the like [s]. But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi*. And, with regard to feme-coverts, our laws differ still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme-sole [t]. But with us a married woman is not only utterly incapable of devising *lands* [10], being excepted out of the statute of wills, 34 & 35 Hen. VIII. c. 5, but also she is incapable of making a testament of *chattels*, without the licence of her husband. For all her personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her: it would be therefore extremely inconsistent to give her a power of defeating that provision of the law, by bequeathing those chattels to another [v]. Yet by her husband's licence she may make a testament [u]; and the husband, upon marriage, frequently covenants with her friends to allow her that licence: but such licence is more properly his assent [11]; for, unless it be given to the particu-

2. Persons under duress.

Married women.

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[s] Godolph. p. 1. c. 9.
[t] Ff. 31. 1. 77.
[v] 4 Rep. 51.
[u] Dr. & St. d. 1. c. 7.

(10) See ante, page 375. The banishment of a man for life, by act of Parliament, restores his wife to the rights of discoverture; and even transportation for a term operates, as it seems, to suspend her disabilities during that time. (2 Vern. 104; 1 Moo. & Sc. 11).

(11) But property acquired after the husband's death cannot be affected by his consent, and will not pass by a will made with such consent. (2 East, 556). Where personal property is given to a married woman for her sole and separate use, she may dispose of it by will without the assent of her husband; (1 Ves. J. 46; 13 Ves. 190; 3 Add. 263); and also the produce of it. (2 Vern. 535; Prec. Ch. 44, 355). A power may be reserved to the wife before marriage, of making a disposition of her separate estate (so as to prevent its going to the heir at law), either by way of trust, or of power over a use, or by an agreement for that purpose. (6 Bro. P. C. 156; 2 T. R. 695; see 2 Ves. 191).

But though the instrument by which she disposes of her separate property is not strictly a will, but more in the nature of an appointment, raising a trust which a court of equity will enforce, (Id. ib.), still it is so far testamentary, that it must be proved in a spiritual court before her legatee shall be entitled. (3 Atk. 156; 1 Burr. 431; Doug. 707. See 5 Scott, N. R. 843).

lar will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will[w]. Yet it shall be sufficient to repel the husband from his general right of administering his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed[x]. So that in reality the woman makes no will at all, but only something like a will[y]; operating in the nature of an appointment, the execution of which, the husband, by his bond, agreement, or covenant, is bound to allow. A distinction similar to which we meet with in the civil law. For though a son who was *in potestate parentis* could not by any means make a formal and legal testament, even though his father permitted it[z], yet he might, with the like permission of his father, make what was called a *donatio mortis causa*[a]. The queen consort is an exception to this general rule, for she may dispose of her chattels by will without the consent of her lord[b]: and any feme-covert may make her will of goods, which are in her possession *in auter droit*, as executrix or administratrix; for these can never be the property of the husband[c]: and if she has any pin-money or separate maintenance, it is said she may dispose of her savings thereout by testament, without the control of her husband[d]. But, if a feme-sole makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation in law, and entirely vacates the will[e] [12].

Queen consort.

[499]

3. Persons guilty of crimes, &c.

3. Persons incapable of making testaments, on account of their criminal conduct, are, in the first place, all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king. Neither can a *felo de se* make a will of goods and chattels, for they are forfeited by the act and

[w] Bro. Abr. tit. *Devise*, 34. Stra. 891.
[x] The King *v.* Bettesworth, T. 13 Geo. II. B. R. [Stra. 891. 1111. Toller, 9.]
[y] Cro. Car. 376. 1 Mod. 211.
[z] Ff. 28. 1. 6.
[a] Ff. 39. 6. 25.
[b] Co. Litt. 133.
[c] Godolph. 1. 10.
[d] Prec. Chan. 44.
[e] 4 Rep. 60. 2 P. Wms. 624.

(12) And now the marriage of a male testator is in every case an absolute revocation of his will. (Stat. 7 Will. 4 & 1 Vict. c. 26, s. 18).

manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture[f]. Outlaws also, though it be but for debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time[g] [13]. As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments (as usurers, libellers, and others of a worse stamp), by the common law their testaments may be good[h]. And in general the rule is, and has been so at least ever since Glanvil's time[i], *quod libera sit cujuscunque ultima voluntas.*

Thirdly, the nature and incidents of wills.

Let us next, *thirdly*, consider what this last will and testament is, which almost every one is thus at liberty to make; or what are the nature and incidents of a testament. Testaments, both Justinian[j] and Sir Edward Coke[k] agree to be so called, because they are *testatio mentis:* an etymon which seems to savour too much of the conceit; it being plainly a substantive derived from the verb *testari,* in like manner as *juramentum, incrementum,* and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; "*voluntatis nostrae justa sententia de eo, quod quis post mortem suam fieri velit*[l]:" which may be thus rendered into English, "the legal declaration of a man's intentions, which he wills to be performed after his death." It is called *sententia,* to denote the circumspection and prudence with which it is supposed to be made: it is *voluntatis nostrae sententia,* because it's efficacy depends on it's declaring the testator's intention, whence in England it is emphatically styled his *will:* it is *justa sententia;* that is, drawn, attested, and published, with all due solemnities and forms of law; it is *de eo, quod quis post mortem suam fieri*

Testament.

[500]

[f] Plowd. 261.
[g] Fitzh. Abr. tit. *Descent,* 16.
[h] Godolph. p. 1. c. 12.
[i] L. 7, c. 5.
[j] Inst. 2. 10.
[k] 1 Inst. 111. 322.
[l] Ff. 28. 1. 1.

(13) These are not cases of incapacity (which in law is always understood to mean an inability in respect of the person), but instances merely of the failure of a will from want of a subject-matter. In the case of an outlaw, the statement in the text is incorrect; for a will, made during outlawry, will operate on goods acquired after the outlawry has determined.

velit, because a testament is of no force till after the death of the testator [14].

Written or verbal.

These testaments are divided into two sorts; *written,* and *verbal* or *nuncupative;* of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing. A *codicil, codicillus,* a little book or writing, is a supplement to a will, or an addition made by the testator, and annexed to, and to be taken as part of, a testament: being for it's explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator [m]. This may also be either written or nuncupative [15].

Codicils.

Regulations respecting nuncupative wills.

But, as *nuncupative* wills and codicils (which were formerly more in use than at present, when the art of writing is become more universal) are liable to great impositions, and may occasion many perjuries, the statute of frauds, 29 Car. II. c. 3, hath laid them under many restrictions; except when made by mariners at sea, and soldiers in actual service. As to all other persons, it enacts; 1. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing, and read over to him, and approved; and unless the same be proved to have been so done by the oaths of three witnesses at the least; who, by statute 4 & 5 Ann. c. 16, must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in anywise be good, where the estate bequeathed exceeds 30*l.* unless proved by

[m] Godolph. p. 1. c. 1. § 3.

(14) According to an old distinction, a *testament* is not complete unless an executor is appointed; but the instrument is a *will,* although no executor is named. (Swinb. 1, ss. 1, 3).

(15) It may be here observed, once for all, that every will, and every codicil to or alteration of a will, though only relating to personal estate, must now be in writing, signed by the testator, and attested by two witnesses. (Ante, p. 379, n.) The only exceptions to this rule are, firstly, that any soldier, being in actual military service, or any mariner or seaman (including merchant seamen) being at sea, may dispose of his personal estate as he might have done before the stat. 7 Will. 4 & 1 Vict. c. 26; and, secondly, that as to wills of petty officers and seamen in the navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, &c., the stat. 11 Geo. 4 & 1 Will. 4, c. 20, remains in force.

three such witnesses, present at the making thereof (the Roman law requiring seven [n]), and unless they or some of them were specially required to bear witness thereto by the [501] testator himself; and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be surprized with sickness on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process hathfirst issued to call in the widow, or next of kin, to contest it, if they think proper. Thus hath the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse, and is hardly ever heard of, but in the only instance where favour ought to be shewn to it, when the testator is surprized by sudden and violent sickness [16]. The testamentary words must be spoken with an intent to bequeath, not any loose idle discourse in his illness; for he must require the by-standers to bear witness of such his intention: the will must be made at home, or among his family or friends, unless by unavoidable accident; to prevent impositions from strangers: it must be in his *last* sickness; for if he recovers, he may alter his dispositions, and has time to make a written will: it must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience, or surprized.

Requisites to written wills.

As to *written* wills, they need not any witness of their publication. I speak not here of devises of lands, which are quite of a different nature; being conveyances by statute, unknown to the feodal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its

[n] Inst. 2. 10. 14.

(16) See Cas. tem. Lee, 343; 1 Add. 389; 2 Phillim. 190.

publication, is good; provided sufficient proof can be had
[502] that it is his hand-writing[o]. And though written in another man's hand, and never signed by the testator, yet if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate[p][17]. Yet it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses: which last was always required in the time of Bracton[q]; or, rather, he in this respect has implicitly copied the rule of the civil law.

Will inoperative before death.

No testament is of any effect till after the death of the testator. "*Nam omne testamentum morte consummatum est: et voluntas testatoris est ambulatoria usque ad mortem*[r]." And therefore, if there be many testaments, the last overthrows all the former[s]: but the republication of a former will revokes one of a later date, and establishes the first again[t][18].

Wills, how avoided.

Hence, it follows, that testaments may be avoided three ways: 1. If made by a person labouring under any of the incapacities before mentioned: 2. By making another testament of a later date: and, 3. By cancelling or revoking it[19].

Revocation.

For, though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it: because my own act or words cannot alter the disposition of law, so as to make that irrevocable which is in its own nature revocable[u]. For this, saith Lord Bacon[w], would be for a man to deprive himself of that, which of all other things is most incident to human condition; and that is alteration or re-

[o] Godolph. p. 1. c. 21. Gilb. Rep. 260.
[p] Comyns, 452, 3, 4.
[q] L. 2. c. 26.
[r] Co. Litt. 112.
[s] Litt. § 168. Perk. 478.
[t] Perk. 479.
[u] 8 Rep. 82.
[w] Elem. c. 19.

(17) See ante, p. 500, n.

(18) By the present law, a will that has been revoked can only be revived by re-execution or by a codicil duly attested, and shewing an intention to revive it, as, by referring to it as a subsisting will. If the will was first partially, and then wholly, revoked, a revival by either of these means will not revive the part that was first revoked, unless an intention to that effect is expressed. Stat. 7 Will. 4 & 1 Vict. c. 26, s. 23).

(19) Vide ante, p. 379, n.

pentance. It hath also been held, that, without an express revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a presumptive or implied revocation of his former will, which he made in his state of celibacy [x] [20]. The Romans were also wont to set aside testaments as being *inofficiosa*, deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient reason [y]) any of the children of the testator [z]. [503] But, if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed; but was then supposed to have acted thus for some substantial cause: and in such case no *querela inofficiosi testamenti* was allowed. Hence probably has arisen that groundless vulgar error, of the necessity of leaving the heir a shilling or some other express legacy, in order to disinherit him effectually: whereas the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore though the heir or next of kin be totally omitted, it admits no *querela inofficiosi*, to set aside such a testament.

Fourthly, of executors and administrators.

We are next to consider, *fourthly*, what is an executor, and what an administrator, and how they are both to be appointed.

Executors.

An executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors, that are capable of making wills, and many others besides; as feme-coverts, and infants: nay, even infants unborn, or *in ventre sa mere*, may be made executors [a]. But no infant can act as such till the age of seventeen years; till which time administration must be granted to some other, *durante minore aetate* [b] [21]. In like

Durante minore ætate.

[x] Lord Raym. 441. 1 P. Wms. 204.

[y] See Book I. ch. 16.

[z] Inst. 2. 18. 1.

[a] West. Symb. p. 1. § 635.

[b] Went. Off. Ex. c. 18.

(20) Marriage is now an absolute revocation in every case.

(21) But now, by the 38 Geo. 3, c. 88, s. 6, it is provided, that where an infant is *sole* executor, administration with the will annexed shall be granted to the guardian of such infant or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him.

Durante absentiâ, or pendente lite.

manner as it may be granted *durante absentiâ*, or *pendente lite;* when the executor is out of the realm [c], or when a suit is commenced in the ecclesiastical court touching the validity of the will [d]. This appointment of an executor is essential to the making of a will [e] [22]; and it may be performed either by express words, or such as strongly imply the same [23]. But if the testator makes an incomplete will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act; in any of these cases, the ordinary must grant administration *cum testamento annexo* [f] to some other person; and then the duty of the administrator, as also when he is constituted only *durante minore aetate*, &c. of another, is very little different from that of an executor. And this was law so early as the reign of Henry II. when Glanvil [g] informs us, that "*testamenti executores esse debent ii, quos testator ad hoc elegerit, et quibus curam ipse commiserit; si vero testator nullos ad hoc nominaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere.*"

[504]

Cum testamento annexo.

Administrators.

But if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the third and Henry the eighth, before mentioned, direct. In consequence of which we may observe; 1. That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the

Who to be appointed.

[c] 1 Lutw. 342.
[d] 2 P. Wms. 589, 590.
[e] Went. c. 1. Plowd. 281.
[f] 1 Roll. Abr. 907. Comb. 20.
[g] L. 7. c. 6.

(22) Vide ante, p. 500, n.

(23) The testator may appoint one or more executors, either over his whole property or for different kinds, as one executor in respect of his land, another of his debts, another of his plate, &c.; or he may so divide the duty where his property is in different countries; but where a number are appointed in conjunction, they are in law considered in the light of an individual person. (Toller, 37). An executor may be constructively appointed, as by the testator's recommending or committing to him the duties, or conferring upon him the rights of office, or by any other words shewing an intention to invest him with that character. (Swinb. pt. 4, s. 5, pl. 3; Cro. El. 43, 164; 1 Hagg. 80). As to the executor's refusal or acceptance of the office, see 1 Williams on Executors, 199, 3rd ed.; 3 Add. 273.

husband, or his representatives[h]: and of the husband's effects, to the widow or next of kin; but he may grant it to either, or both, at his discretion[i]. 2. That, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases[k]. 3. That this *nearness* or propinquity of degree shall be reckoned according to the computation of the civilians[l]; and not of the canonists, which the law of England adopts in the descent of real estates[m]: because in the civil computation the intestate himself is the *terminus a quo* the several degrees are numbered; and not the common ancestor, according to the rule of the canonists[24]. And therefore in the first place the children, or (on failure of children) the parents of the deceased, are entitled to the administration; both which are indeed in the first degree; but with us[n] the children are allowed the preference[o]. Then follow brothers[p], grandfathers[q], uncles or [505] nephews[r] (and the females of each class respectively), and lastly cousins. 4. The half blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate, and only excluded from inheritances of land upon feodal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood[s]; and the

[h] Cro. Car. 106. Stat. 29 Car. II. c. 3. 1 P. Wms. 381.

[i] Salk. 36. Stra. 532.

[k] See page 496.

[l] Prec. Chanc. 593.

[m] See page 203, 207, 224.

[n] Godolph. p. 2. c. 34. § 1. 2 Vern. 125.

[o] In Germany there was a long dispute whether a man's children should inherit his effects during the life of their grandfather; which depends (as we shall see hereafter) on the same principles as the granting of administrations. At last it was agreed at the diet of Arensberg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being chosen on both sides, those of the children obtained the victory, and so the law was established in their favour, that the issue of a person deceased shall be entitled to his goods and chattels in preference to his parents. (Mod. Un. Hist. xxix. 28).

[p] Harris in Nov. 118, c. 2.

[q] Prec. Chanc. 527. 1 P. Wms. 41.

[r] Atk. 455.

[s] 1 Ventr. 425.

(24) Vide ante, p. 207, n.; 4 Beav. 360. The rule of computation adopted under the Statute of Distributions governs the right to administer, because the court always grants administration to the parties entitled to the effects. (1 Hagg. 342). The Statute of Distributions was penned by a civilian, and, except in some few particular instances mentioned in the statute itself, is to be governed and construed by the rules of the civil law. (Prec. Ch. 593).

ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his own discretion [t] [25]. 5. If none of the kindred will take out administration, a creditor may, by custom, do it [u]. 6. If the executor refuses [26], or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin [w]. 7. And, lastly, the ordinary may, in defect of all these, commit administration (as he might have done [x] before the statute of Edward III.) to such discreet person as he approves of: or may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody [y], and to do other acts for the benefit of such as are entitled to the property of the deceased [z]. If a bastard, who has no kindred, being *nullius filius*, or any one else that has no kindred, dies intestate, and without wife or child, it hath formerly been held [a] that the ordinary might seise his goods, and dispose of them *in pios usus*. But the usual course now is for some one to procure letters patent or other authority from the king; and then the ordinary of course grants administration to such appointee of the crown [b] [27].

Bastard.

[506]

The respective interests of executor and administrator.

The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor: so that the executor of A.'s executor is to

[t] Aleyn. 36. Styl. 74.
[u] Salk. 38.
[w] 1 Sid. 281. 1 Ventr. 219.
[x] Plowd. 278.
[y] Went. ch. 14.
[z] 2 Inst. 398.
[a] Salk. 37.
[b] 3 P. Wms. 33.

(25) The rule where two persons in equal degree apply, is, to prefer the whole blood. (2 Cas. tem. Lee, 299).

(26) And by the 38 Geo. 3, c. 87, if, after the expiration of twelve calendar months from the testator's death, the executor, to whom probate had been granted, shall be residing out of the jurisdiction of his majesty's courts, on application of any creditor, next of kin, or legatee, grounded upon an affidavit, in the form therein specified, stating the nature of his demand and the absence of the executor, such administration shall be granted. The statute only applies where there are proceedings in Chancery. (See 2 Add. 54, 505; 2 Hagg. 77; 3 Bos. & P. 26).

(27) Where a bastard dies intestate without wife or issue, the king is entitled to his personal property as administrator; but it is usual for the crown to grant the administration of it to some relation of the bastard's father or mother, reserving one-tenth or other small proportion of it. (1 Wood, 398). —[CHRISTIAN.] (See 4 Hagg. 213; 2 Cas. tem. Lee, 394).

all intents and purposes the executor and representative of A. himself[c]; but the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A.[d] For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence[28]: but the administrator of A. is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all: and therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A.'s executor, he has clearly no privity or relation to A.; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, *of the goods* of the deceased *not* administered by the former executor or administrator. And this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property[e]. But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, *viz.* of certain specific effects, such as a term of years, and the like; the rest being committed to others[f].

Administrator *de bonis non*, &c.

[507]

Having thus shewn what is, and who may be, an executor or administrator, I proceed now, *fifthly* and lastly, to inquire into some few of the principal points of their office and duty. These in general are very much the same in both executors and administrators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and

Fifthly, of the office and duty of executors and administrators.

[c] Stat. 25 Edw. III. st. 5. c. 5. 1 Leon. 275.
[d] Bro. Abr. tit. *Administrator*, 7.
[e] Styl. 225.
[f] 1 Rol. Abr. 908. Godolph. p. 2. c. 30. Salk. 36.

(28) The executor of a sole executor, or of a sole surviving executor, represents the original testator's estate, provided his own testator has proved the will; and by this connexion, the chain of representation may be carried on indefinitely. (Wentw. Off. Ex. 215, 4th ed.; 1 Cox, 426).

secondly, that an executor may do many acts before he proves the will [g] [29], but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will and not from the probate [h], the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased [i], and many other transactions [k]), he is called in law an executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages; but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong [l]. Such a one cannot bring an action himself in right of the deceased [m], but actions may be brought against him. And, in all actions by creditors against such an officious intruder, he shall be named an executor, generally [n]; for the most obvious conclusion which strangers can form from his conduct is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof [o]. He is chargeable with the debts of the deceased, so far as assets come to his hands [p]: and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree [q], himself only excepted [r]. And though, as against the rightful executor or administrator, he cannot plead such payment,

Executor de son tort.

[508]

[g] Wentw. ch. 3.
[h] Comyns, 151.
[i] 5 Rep. 33, 34.
[k] Wentw. ch. 14. Stat. 43 Eliz. c. 8.
[l] Dyer, 166.
[m] Bro. Abr. tit. *Administrator*, 8.
[n] 5 Rep. 31.
[o] 12 Mod. 471.
[p] Dyer, 166.
[q] 1 Chan. Cas. 33.
[r] 5 Rep. 30. Moor. 527.

(29) He may commence an action, but he cannot declare in the action, before probate; for when he declares, he must produce in court the letters testamentary. And he may release or pay a debt, may assent to a legacy, and be sued, before probate, and do other acts, which seem to be fully enumerated in 1 Salk. 299, and Com. Dig. *Administrator*, B. 9.—[CHRISTIAN.] (3 Car. & P. 123; 3 Taunt. 113; 2 Sim. 241). And death of an executor before probate will not affect the validity of his acts, if the will is ultimately proved; the rule being merely, that probate of the will is the only evidence receivable in the civil courts of the due appointment of an executor. (8 Sim. 67; 3 B. & Cr. 335; 7 Ad. & E. 240, 243).

yet it shall be allowed him in mitigation of damages [s]; unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt [t 30]. But let us now see what are the power and duty of a rightful executor or administrator.

1. He must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased [u 31]. 1. To bury deceased.

2. The executor, or the administrator *durante minore aetate*, or *durante absentiâ*, or *cum testamento annexo*, must *prove the will* of the deceased: which is done either in *common form*, 2. Executor to prove and deposit the will, and obtain copy or probate.

[s] 12 Mod. 441. 471.
[t] Wentw. ch. 14.
[u] Salk. 196. Godolph. p. 2. c. 26. § 2.

(30) It is held, that the least intermeddling with the effects of the intestate, even milking cows, or taking a dog, will constitute an executor de son tort. (Dy. 166). An executor of his own wrong will be liable to an action, unless he has delivered over the goods of the intestate to the rightful administrator before the action is brought against him. And he cannot retain the intestate's property in discharge of his own debt, although it is a debt of a superior degree. (3 T. R. 590; 2 T. R. 100).—[CHRISTIAN.] (See 4 Mee. & W. 9, 378).

(31) As against creditors the executor will not be allowed to expend more than is absolutely necessary. In strictness no funeral expenses are to be allowed in the case of an insolvent estate, except for the coffin, shroud, and ringing the bell, the fees of the parson, clerk, sexton, and bearers, but not for the pall or ornaments, or expenses of entertainment. (Per Holt, C. J., 1 Salk. 296; per Lord Hardwicke, 3 Atk. 119. At law, when a person dies indebted, the rule is, that no more shall be allowed for a funeral than is necessary; at first only 40*s.*, then 5*l.*, at last 10*l.*; but a court of equity is not bound down by such strict rules, especially when a testator leaves great sums in legacies, which is a reasonable ground for an executor to believe an estate is solvent; and in one case the court allowed 60*l.*, as the testator had directed his corpse to be buried at a church thirty miles off. In the case of *Offey* v. *Offey*, Prec. Ch. 27, 600*l.* had been laid out in Mr. Offey's funeral (whose personal estate was insufficient for payment of his debts), which the court allowed, he being a man of great estate and reputation in his county, and buried there; but this was not *come semble* against creditors. (Bull. N. P. 143; 1 Salk. 296).—[CHITTY.] (See 2 Scott, 390; 1 B. & Ad. 260; 3 You. & J. 28; 2 C. & M. 612; 3 Mee. & W. 350; 3 Nev. & P. 388; 4 Sim. 512).

which is only upon his own oath before the ordinary, or his surrogate [32]; or *per testes*, in more solemn form of law, in case the validity of the will be disputed [w]. When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of it's having been proved before him: all which together is usually stiled the *probate* [33]. In defect of any will, the person entitled to be administrator must also, at this period, take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 & 23 Car. II. c. 10, enter into a bond with sureties, faithfully to execute his trust [34]. If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only proper ones: but if the deceased had *bona notabilia*, or chattels to the value of a *hundred shillings*, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative [x]; whence the courts where the validity of such wills is tried, and the offices where they are registered, are called the prerogative courts, and the prerogative offices, of the provinces of Canterbury and York [35]. Lyndewode, who flourished in the beginning

Probate.

[509]

Bona notabilia.

[w] Godolph. p. 1. c. 20. § 4.

[x] 4 Inst. 335.

(32) The executor or any other person, administering the estate, must prove the will or take out administration, within six months after the deceased's death, under penalty of 50*l.* (37 Geo. 3, c. 90, s. 10).

(33) See 7 Ad. & Ell. 240.

(34) See Cowp. 140; 8 B. & Cr. 151; 1 Cr. & M. 691.

(35) See 2 B. & Ad. 423; 12 Ves. 417; 2 Scott, 721; 1 Scott, N. R. 43; 1 Myl. & K. 215; 2 Hare, 342. As to bona notabilia, see 1 Williams on Executors, 220, 3rd ed.; 2 Saund. Index, *Administrators;* 2 Mee. & W. 87; 4 Id. 171.

If there are *bona notabilia* in both provinces, the archbishop in each shall grant probate accordingly. (1 Salk. 39; 2 Lev. 86; Wentw. Off. Ex. 48; 7 Sim. 102). And if in England and Ireland, probates shall be granted in both countries. (Dyer, 305; Bac. Ab. *Executors*, (E.), 3; Codex, 472; see 2 Gale & D. 312). If the testator died beyond sea, though the goods be in one diocese only, the archbishop is to grant the probate. (Roll. Ab. 908; see 1 Hare, 482; 11 Sim. 397).

of the fifteenth century, and was official to Archbishop Chichele, interprets these hundred shillings to signify *solidos legales;* of which he tells us seventy-two amounted to a pound of gold, which in his time was valued at fifty nobles, or 16*l.* 13*s.* 4*d.* He therefore computes[y] that the hundred shillings, which constituted *bona notabilia,* were then equal in current money to 23*l.* 3*s.* $0\frac{1}{4}d.$ This will account for what is said in our antient books, that *bona notabilia* in the diocese of London[z], and indeed every where else[a], were of the value of ten pounds by *composition;* for if we pursue the calculations of Lyndewode to their full extent, and consider that a pound of gold is now almost equal in value to an hundred and fifty nobles, we shall extend the present amount of *bona notabilia* to nearly 70*l.* But the makers of the canons of 1603 understood this antient rule to be meant of the shillings current in the reign of James I., and have therefore directed[b] that *five pounds* shall for the future be the standard of *bona notabilia,* so as to make the probate fall within the archiepiscopal prerogative. Which prerogative (properly understood) is grounded upon this reasonable foundation; that, as the bishops were themselves originally the administrators to all intestates in their own diocese, and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased other than such as lay within their own dioceses, [510] beyond which their episcopal authority extends not. But it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had *bona notabilia;* besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is, therefore, very prudently vested in the metropolitan of each province, to make in such cases one administration serve for all. This accounts very satisfactorily for the reason of taking out administration to intestates that have large and diffusive property, in the prerogative court: and the probate of wills

[y] Provinc. l. 3. t. 13. c. item, *v. centum, &c.* statutum *v. laicis.*

[z] 4 Inst. 335. Godolph. p. 2. c. 22.

[a] Plowd. 281.

[b] Can. 92.

naturally follows, as was before observed, the power of granting administrations; in order to satisfy the ordinary that the deceased has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of administring the effects.

3. To make inventory.

3. The executor or administrator is to make an *inventory* [c] of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

4. To collect assets.

4. He is to *collect* all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased [d], and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest [e]; but in case of administrators it is otherwise [f] [36]. [511] Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator [g]; that is sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him [37]: which is the next thing to be considered; for,

5. To pay debts in due order.

5. The executor or administrator must *pay* the *debts* of the deceased. In payment of debts he must observe the

[c] Stat. 21 Hen. VIII. c. 5.
[d] Co. Litt. 209.
[e] Dyer, 23.
[f] 1 Atk. 460.
[g] See page 244.

(36) Subsequently to the case of *Hudson* v. *Hudson*, (1 Atk. 460), it has been settled that there is no distinction of this kind; a single administrator has all the power that a single executor has. (2 Ves. sen. 267; Selw. N. P. 790. But see 1 Phillim. 126; 1 Hagg. 222).

(37) The goods of a testator, in the possession of the executor, cannot be taken in execution of a judgment in an action brought against the executor in his own right. (4 T. R. 621).

rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate [38]. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty [h]. Thirdly, such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woollen [i], money due upon poors rates [k], for letters to the post office [l], and some others [39]. Fourthly, debts of record; as judgments, (docquetted according to the statute 4 & 5 W. & M. c. 20 [40]), statutes, and recognizances [m]. Fifthly, debts due on special contracts [41]; as for rent (for which the lessor has often a better remedy in his own hands, by distreining), or upon bonds, covenants, and the like, under seal [n] [42]. Lastly, debts on simple contracts, viz. upon notes unsealed, and verbal promises. Among these simple con-

[h] 1 And. 129.
[i] Stat. 30 Car. II. c. 3.
[k] Stat. 17 Geo. II. c. 38.
[l] Stat. 9 Ann. c. 10.
[m] 4 Rep. 60. Cro. Car. 363.
[n] Wentw. ch. 12.

(38) An executor has constructive notice of debts of record; but he is not answerable for other specialty debts of which he had no notice at the time of applying the assets in payment of debts of a lower degree. (1 T. R. 690; 2 Mee. & W. 684; 3 B. & Ad. 655).

(39) The 30 Car. 2, c. 3, is repealed by 54 Geo. 3, c. 108.

(40) The stat. 2 & 3 Vict. c. 11, has abolished the docketting of judgments under the 4 & 5 W. & M. c. 20, without repealing the enactment; and it remains to be decided whether the priority of judgment debts can now be preserved. (See 3 Scott, N. R. 700; 1 Bos. & P. 307). Decrees in equity have the same priority as judgments at law. (3 Swanst. 573; 3 P. Wms. 401; 2 Salk. 507).

(41) Rent is regarded as a specialty debt, even when it is reserved upon a parol lease. (1 Lord Raym. 515; 1 Freem. 512; 9 Price, 464).

(42) A court of equity will order voluntary bonds or other special contracts, without consideration, to be postponed to simple contract debts; upon the principle that a man ought to be just before he is generous, or that he ought not to make gifts before he has paid his debts. (3 P. Wms. 222).—[CHRISTIAN.] After a suit is commenced, the executor or administrator may still give a preference to other creditors of the same degree, by confessing a judgment to them for the amount of their debts. (1 P. Wms. 295; 3 Scott, N. R. 700; 2 Beav. 219). But after a bill is filed by a creditor for a discovery of assets and payment of his debt, the executor or administrator may pay another creditor of equal degree without confessing a judgment. (3 P. Wms. 401). Sir James Mansfield said, he wished it were more generally known, (for he believed, that lawyers in the courts of law were not aware of it), that, through the medium of a court of equity, the creditors of a deceased insolvent may always be compelled to

tracts, servants' wages are by some [o] with reason preferred to any other: and so stood the antient law, according to

[o] 1 Roll. Abr. 927.

make an equal distribution of the assets. It was only necessary for a friendly bill to be filed against the executor or administrator, to account; after which the chancellor would injoin any of the creditors from proceeding at law. (1 Campbell, N. P. 148).—[CHRISTIAN.] See 2 Russ. & M. 75; 8 Sim. 63.

In the payment of debts there is a distinction between legal and equitable assets. The former are such as the executor takes in his representative capacity, and is answerable for at law to creditors; and in applying such assets, he is bound to observe the order of priority mentioned in the text. But equitable assets are applicable in payment of all debts of whatever degrees, pari passu; and these are every kind of property which comes to an executor's hands in any other than his legal capacity, and so can be reached only in equity. (2 Atk. 294). Under this denomination come all kinds of trust property, whether real or personal. (7 Ves. 319; 8 Id. 26; 9 B. & Cr. 489; 3 Mee. & W. 573). By the statutes 11 Geo. 4 & 1 Will. 4, c. 47, and 3 & 4 Will. 4, c. 104, real estate, whether freehold or copyhold, and whether devised (unless devised for payment of, or charged with, debts) or descended, are made assets, to be administered in equity, for payment of simple contract debts, but with an express saving of the priority of specialty creditors. When there is an express charge of debts by the will, then the statutes do not apply, and the real estates, if devised, (1 Br. C. C. 138, n.; 9 B. & Cr. 489), are equitable assets.

If land descend to the heir charged by the testator with his debts, then it shall be liable to all his debts, although it shall be considered as legal assets, and they shall be paid according to their priority. (2 Atk. 290; 1 P. Wms. 430). The equity of redemption of lands, mortgaged in fee, is equitable assets; for the creditors can have no relief from it, but in a court of equity. (2 Atk. 290).

All specialty creditors, where the testator has bound himself and his heirs, have their election, whether they will resort to the heir, who has lands by descent, or to the executor, for payment of their debts; and although a court of equity will not interpose its authority, and compel the specialty creditors to apply to the heir, yet if they exhaust the personal fund, or leave insufficient for the discharge of the simple contract creditors, it will enable these to stand in the place of the specialty creditors, and to recover from the heir at law the amount of what they have drawn out of the personal fund. (1 Ves. 312). This is called marshalling the assets.

A court of equity will marshal the assets, or throw the amount of the specialty debts upon the real estate, against the heir in favour of legatees, but not against a devisee; as he is equally an object of the testator's favour. In that case, if there is a deficiency in the personal assets, the legatees must abate in proportion. (1 P. Wms. 678; 5 Ves. 359).

If a person mortgages an estate and dies, the heir at law shall have the estate exonerated, or the mortgage discharged, by the personal representative out of the personal estate, provided it does not interfere with other debts and legacies, for the personal estate had been augmented to that extent in consequence of the mortgage; and therefore the heir at law shall not have the benefit of the personal estate to discharge a mortgage, which was not

Bracton[p] and Fleta[q], who reckon among the first debts to be paid, *servitia servientium et stipendia famulorum*. Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to[r 43]. But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own wrong, which is contrary to the rule of law[s]. If a creditor constitutes his debtor his executor, [512] this is a release or discharge of the debt, whether the executor acts or no[t 44]: provided there be assets sufficient to pay the testator's debts: for though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary[u]. Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest: for, without a suit commenced, the executor has no legal notice of the debt[w].

6. When the debts are all discharged, the *legacies* claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts[x]. 6. To pay legacies.

[p] L. 2, c. 26.
[q] L. 2, c. 56, § 10.
[r] 10 Mod. 496. See vol. III. p. 18.
[s] 5 Rep. 30.
[t] Plowd. 184. Salk. 299.
[u] Salk. 303. 1 Roll. Abr. 921.
[w] Dyer, 32. 2 Leon. 60.
[x] 2 Vern. 434. 2 P. Wms. 25.

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brought upon the estate by the testator or intestate. (2 Cox's P. Wms. 664; 2 Bro. 101).

If a testator, having mortgaged an estate, devises it by will, and permits other lands to descend to his heir, the devisee shall have the estate devised to him exonerated out of the personal estate, and if that is insufficient, by the heir at law. (2 Atk. 430).—[CHRISTIAN.]

(43) See 5 Sim. 228; 2 Nev. & P. 557.

(44) See 9 B. & Cr. 130. In the case of an executor, the debt is actually discharged and gone; but if the debtor is appointed administrator, this is merely a suspension of the remedy. (1 Salk. 306). And it seems to be now settled, that in equity this release shall not operate to the executor's benefit against the legatees or next of kin, the court regarding the debt as having been paid by the debtor in that capacity to himself in his representative capacity, and so assets in his hands. (3 Br. C. C. 110; 11 Ves. 90; 13 Ves. 264).

A legacy is a bequest, or gift, of goods and chattels by testament; and the person to whom it was given is stiled the legatee: which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists, and some others. This bequest transfers an inchoate property to the legatee: but the legacy is not perfect without the assent [45] of the executor: for, if I have a *general* or *pecuniary* legacy of 100*l.*, or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor [y] [46]. For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator; the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our antient law [z], "*de bonis defuncti primo deducenda sunt ea quae sunt necessitatis, et postea quae sunt utilitatis, et ultimo quae sunt voluntatis.*" And in case of a deficiency of assets, all the *general* legacies must abate proportionably, in order to pay the debts; but a *specific* legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it [a]. Upon the same principle, if the legatees have been paid their legacies, they are afterwards bound to refund a ratable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid [b]. And this law is as old as Bracton and Fleta, who tells us [c], "*si plura sint debita, vel plus legatum fuerit, ad quae catalla defuncti non sufficiant, fiat ubique defalcatio, excepto regis privilegio.*"

Abatement of legacies.

[513]

Lapse.

If the legatee dies before the testator, the legacy is a lost

[y] Co. Litt. 111. Aleyn, 3, 9.
[z] L. 2, c. 26.
[a] 2 Vern. 111.
[b] Ibid. 205.
[c] Bract. l. 2, c. 26. Flet. l. 2, c. 57, § 11.

(45) See 5 Beav. 164.

(46) In *Deeks* v. *Strutt*, (5 T. R. 690), it was determined that no action can be maintained in a court of law to recover a legacy, though it had been before decided that an action of assumpsit might have been brought against an executor in his own right, if, in consideration of assets in his possession, and of forbearance, he had promised to pay the legatee the legacy. (Cowp. 284, 289). But if the executor assent, an action at law may be maintaind for a *specific* legacy, as for a lease or any other chattel.—[CHRISTIAN.] See 7 B. & Cr. 542; 3 East, 120; 1 Moo. & P. 209.

or *lapsed* legacy, and shall sink into the *residuum* [47]. And if a *contingent* legacy be left to any one, as *when* he attains, or *if* he attains, the age of twenty-one, and he dies before that time, it is a lapsed legacy [d 48]. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy; an interest which commences *in praesenti*, although it be *solvendum in futuro* [49]: and if the legatee dies

[d] Dyer, 59. 1 Equ. Cas. Abr. 295.

(47) But now, where the devisee or legatee is a child or other issue of the testator, and the gift is of an interest which would not have determined by the death of the object, the gift shall not lapse in case of his death before the testator, leaving issue surviving the testator, but shall "take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." (Stat. 7 Will. 4 & 1 Vict. c. 26, s. 33). The subject of the gift will therefore pass under any general words in the will of the deceased devisee or legatee, which would have been sufficient to include it had he survived the testator; (8 Jur. 77); and, by sect. 32 of the same statute, a devise of an estate tail to any person shall not lapse by his death, if he leaves issue surviving the testator.

(48) It is incorrect to say that such a legacy lapses; it is merely a contingent gift, which fails, because the contingency does not happen.

(49) If the legacy be *given when*, or *if* the legatee attain a certain age, or to him *at* that age, the time is said to be annexed to the substance of the legacy, and it is not vested or transmissible to his representatives if the legatee die before that age; but if it is *payable* at that age, or when, or if he attains it, the time is said to be annexed to the payment only, and the legacy is vested and transmissible though he should die without ever arriving at that age. (2 Atk. 128; 1 Burr. 227). This is a trifling distinction, and understood or attended to by few testators who make their own wills. If the testator gives a legacy without referring the time to the payment, it will notwithstanding be vested, if he gives the *interest* until that time, because that will shew his intention, (2 Bro. 3; 2 P. Wms. 612, n. 1), and the legatee's legal representatives are entitled to it immediately on his death. (1 Ves. 118). But this rule will not extend to a maintenance less than the interest. (3 Bro. 416). But if lands are devised, *when* the devisee attains a certain age, the interest in the estate will be vested, and, upon the death of the devisee before that age, will descend to his heir. (3 T. R. 41). —[CHRISTIAN.]

It is generally true, that, both portions created by deed or will, and legacies which are to be raised out of real property and to be paid upon a future day, shall never be raised if the person to whom they are given dies before the day of payment. But legacies and portions in a will shall be raised, if the time of payment is postponed on account of the circumstances of the testator's estate, or till after the death of the testator's wife; (2 Atk. 127); or of any other person; (1 Ves. 44); and not on account of the circumstances of the legatee; (3 Atk. 319); or where it is the apparent intention of the testator, notwithstanding the death of the legatee prior to the time specified. If the portions are to be raised out of land, and no time is limited, although the

before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable, in case the legatee had lived. This distinction is borrowed from the civil law[e]; and its adoption in our courts is not so much owing to its intrinsic equity, as to its having been before adopted by the ecclesiastical courts. For, since the chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations; and that the subject should have the same measure of justice in whatever court he sued[f]. But, if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir[g]; for, with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction[50]. And, in case of a vested legacy, due

[e] Ff. 35. 1. 1. & 2. [f] 1 Eq. Cas. Abr. 295. [g] 2 P. Wms. 601.

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cases upon the subject are contradictory, it seems they shall sink into the estate, if the children die before they are wanted. (See the cases upon this subject fully collected in 2 Cox's P. Wms. 612; and Harg. Co. Litt. 237). [CHRISTIAN.]

(50) When the gift is to a class of individuals (as the children of A. B.) described as "now living," or otherwise confined to the members existing at the date of the will, the shares of those who die before the testator will lapse, (2 P. Wms. 489), unless the gift is construed to be a gift in joint-tenancy, in which case the incident of survivorship is imported, as it were, by anticipation into the gift, and the survivors will take a joint interest in the entire subject-matter. (3 Ves. 628). And if there are no words indicating that the class is to be ascertained at any period before the testator's death, and the gift is to take effect or vest immediately on his death, the members of the class at that moment will take all. (2 Cox, 190; 13 East, 526). When the enjoyment of the gift is postponed to a period beyond the testator's death, a variety of questions, often of great difficulty, may arise, which cannot be discussed here.

Lapse of a personal legacy was a benefit to the residuary legatee, unless the lapsed legacy was a share in the residue itself, given to several persons, as tenants in common, in which case it was held (and seems to be still law) that the survivors would not take the lapsed share, but that it would go to the next of kin of the testator. (2 P. Wms. 489; 1 Swanst. 570). The rule as to lapse of particular gifts of real estate was different. A will only passed such estates of freehold (whether in lands of freehold or of copyhold tenure) as the testator was entitled to at the time of making it; and, therefore, as the estates included in a general devise of all the testator's real estate, were ascertainable at the time of making it, a devise of "all my freehold estates," and a devise of "all my estates called A., B., and C.," (these being all the estates belonging to the testator), were held to be equally specific; and, of course, if after a specific gift of estate A., the testator had devised "all the residue of his estates" to another

immediately, and charged on land or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator [h] [51].

[514]

[h] 2 P. Wms. 26, 27.

person, that would have been equally specific. Hence arose the rule, that a devise of real estate lapsed for the benefit of the heir. (1 Ves. & B. 175; 3 Mau. & S. 300). But a failure of a partial estate or interest in a particular freehold, lapsed for the benefit of the devisee of the ulterior interest. (2 N. R. 383; 3 Atk. 486). Consistently with this rule, it was held (whenever particular expressions did not require a different construction), that where a mere equitable charge of a sum of money on an estate was made for the benefit of a particular person, on the death of such person before the testator, the devisee of the estate charged was entitled to the benefit of the failure; but if the money to be raised was actually separated from the estate, by a limitation, for instance, of a term to a trustee for the purpose of raising it, or by directing the money to be paid to the executors for certain purposes, (1 Ves. sen. 108), then the failure of the whole or any part of the beneficial gifts of the money or other interest thus absolutely severed from the rest of the estate, was for the benefit of the heir. If the limitation to the trustee failed, the charge attached of course in equity upon the ulterior interest; if the beneficial gift failed also, there might have been room to contend against the heir's claim; but the case has never arisen. Of course, if a term was created for particular purposes, on those purposes being satisfied, the trustee of the term held it in trust for the ulterior devisee, and not for the heir. And where the charge was to take effect on a contingency, if the contingency did not happen, the heir could not claim the benefit of it. (See 1 Br. C. C. 61, 503; 2 Eden, 262; 18 Ves. 462; 4 Ves. 60; 3 Dow, 194; 2 P. Wms. 361, 601; 5 Myl. & Cr. 125. See, however, 1 Jarm. Wills, 300, 513. The cases are very difficult to be reconciled).

The stat. 7 Will 4 & 1 Vict. c. 26, s. 25, enacts, that, unless a contrary intention appears by the will, such real estate or interest thereon as shall be comprised in a lapsed devise, or in a devise which fails as being contrary to law (as where given to a charity), or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will. It is, perhaps, open to argument, that this clause leaves untouched the question as to the destination of a lapsed charge upon an estate specifically devised, except by raising it between the specific devisee and the residuary devisee, instead of between the specific devisee and the heir. (See 1 Jarm. Wills, 309).

(51) A specific legacy (as of a certain sum of stock belonging to the testator) belongs to the legatee from the testator's death, together with the profits accruing on it from that time. (6 Ves. 345; see 8 Ves. 412; 1 Sch. & Lef. 11). A pecuniary legacy, given by a parent to a legitimate child under age, shall carry interest from the death of the testator, although the legacy is payable at a future day; (3 Atk. 60, 432; 3 Ves. 13; 1 Swanst. 553; 1 Beav. 271); and it seems the rule prevails in the case of grandchildren; (3 Ves. 12; 5 Id. 194); and illegitimate

Of donations causâ mortis.

Besides, these formal legacies, contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a donation *causâ mortis*. And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, (under which have been included bonds, and bills drawn by the deceased upon his banker), to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor: yet it shall not prevail against creditors; and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causâ* [i]. This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual possession [k]; and so far differs from a testamentary disposition: but seems to have been handed to us from the civil lawyers [l], who themselves borrowed it from the Greeks [m] 52.

[i] Prec. Chanc. 269. 1 P. Wms. 406. 441. 3 P. Wms. 357.

[k] Law of Forfeit. 16.

[l] Inst. 2. 7. 1. Ff. l. 39, t. 6.

[m] There is a very complete *donatio mortis causâ*, in the Odyssey, b. 17, v. 78, made by Telemachus to his friend Piraeus; and another by Hercules, in the Alcestes of Euripides, v. 1020.

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children, if it clearly appear, that the testator intended to put himself in *loco parentis;* (3 Ves. 12; 6 Id. 546; see 2 You. & C. C. C. 372); otherwise the child might perish within the year for want of maintenance. (1 Ves. 310).

(52) See 4 Russ. 25. Our law as to gifts of this kind agrees with the civil law, which is thus expressed: "mortis causâ donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut si quid humanitus ei contigisset, haberet is qui accepit; sin autem supervixisset, is, qui donavit, reciperet; vel si eum donationis pœnituisset; aut prior decesserit is cui donatum sit." (Inst. l. ii, tit. 7; see 2 Ves. jun. 118; Prec. Ch. 269, 300; 2 Ves. sen. 440). A gift mortis causâ must be made by actual delivery of the subject-matter, or of the physical means of exclusive dominion over it, to the intended donee or a trustee for him, in present expectation of death, and must be expressly or impliedly intended to take effect only in that event, and to be revocable; and is, accordingly, revocable by resumption of the possession. (2 Ves. sen. 431; 2 Marsh. 532; 2 B. & Al. 550; 3 Madd. 184; 1 Bligh, N. S. 530; 10 Sim. 244). If it is a gift absolute and irrevocable, it fails as a testamentary gift (in which character it might be made to the donor's wife, would be revocable, subject to the payment of debts, legacy duty, &c., 1 P. Wms. 405); and its validity will depend upon the circumstances, like that of any other dealing inter vivos. (2 Ves. jun. 111). Thus, where a bond was delivered by the obligee a few days before her death to her niece, with a memorandum written on it, purporting to be an assignment to her, but without consideration, the court refused its aid; for

7. When all the debts and particular legacies are discharged, the surplus or *residuum* must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship [n]. But whatever ground there might have been formerly for this opinion, it seems now to be understood [o] with this restriction; that, although where the executor has no legacy at all the *residuum* shall in general be his own, yet wherever there is sufficient on the face of a will, (by means of a competent legacy or otherwise), to imply that the testator intended his executor should *not* have the residue, the undevised surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator [53], concerning whom indeed there formerly was much debate [p], whether or no he could be compelled to make any

7. To pay residue to residuary legatee, or, if none, according to Statute of Distributions.

[515]

[n] Perkins, 525.

[o] Prec. Chanc. 323. 1 P. Wms. 7. 544. 2 P. Wms. 338. 3 P. Wms. 43, 194. Stra. 559. Lawson *v.* Lawson, Dom. Proc. 28 Apr. 1777.

[p] Godolph. p. 2, c. 32.

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the gift, being absolute, was not testamentary, and, as an assignment of a chose in action without consideration, and not perfected by intimation to the debtor or shareholder, it could not be enforced in equity. (1 Myl. & Cr. 226; see 4 Beav. 600). The subject of the gift must be personal property, either in possession or in action; (3 Atk. 214); and upon the principle, that, where a debt is secured upon real estate, the debt is the principal, and the land merely accessory, it is settled, that a mortgage may be effectually disposed of in this way. (1 Bligh, N. S. 498; 1 Dow & Cl. 1). As the delivery may be to one person in trust for another, so a beneficial gift may be coupled with a condition; as to carry on a Chancery suit, or to provide the testator's funeral. (4 Br. C. C. 72; 8 Mee. & W. 401).

(53) Courts of equity construed executors to be trustees for the next of kin in all cases where a fair inference could be collected from the expressions and circumstances of the will, that such was the testator's intention. When a legacy was given to a sole executor, it was held to afford a reasonable conclusion, that the testator intended to give him this alone as a satisfaction and recompense for his trouble; for it would be absurd to give him expressly a part, if it were intended that he should have the whole, or, according to a quaint phrase, he cannot take all and some. But where a legacy was given to one of two or more co-executors, or where unequal legacies were given to co-executors, or where some had legacies and not all, they took the residue; for this might be done by the testator, not in favour of his next of kin, but with an intent to shew a preference to one above the others. (See 1 Cox's P. Wms. 550; 7 Ves. jun. 225; 12 Ves. 298). If there was nothing on the face of the will to raise a presumption against the executor's beneficial title, the next of kin could not resort to parol evidence of the testator's intention to exclude him; (3 Ves. & B. 72); but if there was enough on the face of

distribution of the intestate's estate. For, though (after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased) the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law[q]. And the right of the husband not only to administer, but also to enjoy exclusively, the effects of his deceased wife, depends still on this doctrine of the common law: the statute of frauds declaring only, that the statute of distributions does not extend to this case. But now these controversies are quite at an end: for, by the statute 22 & 23 Car. II. c. 10, explained by 29 Car. II. c. 30, it is enacted, that the surplusage of intestates' estates, (except of femes-covert, which are left as at common law[r]), shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: One third shall go to the widow of

Statutes 22 & 23 Car. II. and 29 Car. II. c. 30, direct distributions of residue of intestate's personal estate.

[q] 1 Lev. 233. Cart. 125. 2 P. Wms. 447.

[r] Stat. 29 Car. II. c. 3, § 25.

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the will to raise a presumption against the executor's claim, then he might resort to parol evidence to rebut that presumption, which evidence the next of kin were necessarily allowed to meet by similar evidence on their side. "There is no doubt, that, where, upon the face of a will, it appears that the executor was intended to take the office only, or where the testator has clearly intended to create a particular trust which he has failed in doing, the next of kin will take as against the executor; on the other hand, it is equally clear, that, if the case be a case of a mere legacy given to an executor, where the presumption of law is to be acted upon, that the testator could not mean to give all and part, (a presumption which, whether reasonable or not, the court is bound to act upon, as the doctrine has been so long laid down), the executor may rebut the presumption by parol evidence, always having regard to the nature of the evidence, to declarations which were made before the testator made his will, at the time of making his will, and after he had made his will; and, in giving effect to all the declarations, having regard to the circumstances under which they were made." Per Lord Eldon, Turn. & Russ. 68. Now, however, the onus lies on the executor to make out an intention in his favour, and this he can no longer do by parol evidence, for, by stat. 11 Geo. 4 & 1 Will. 4, c. 40, the executor shall be deemed by courts of equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of, unless it shall appear *by the will, or any codicil thereto*, the person or persons so appointed executor or executors was or were intended to take such residue beneficially. Provided "that nothing herein contained shall affect or prejudice any right to which any executor, if this act had not been passed, would have been entitled in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions in respect of any residue not expressly disposed of."

the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives; that is, their lineal descendants[54]; if there are no children or legal representatives subsisting, then a moiety shall go to the widow[55], and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters[s]. The next of kindred, here referred to, are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration; of whom we have sufficiently spoken[t 56]. And [516] therefore by this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II. c. 17, if the father be dead, and any of the children die intestate without wife or issue[57],

[s] Raym. 496. Lord Raym. 571. [t] Page 504.

(54) Thus, the widow of a deceased child is not a representative within this provision. (6 Madd. 161).

(55) It has been held, that where there were no next of kin, the widow could only claim one moiety, and that the rest belonged to the crown. (8 Sim. 214). The widow's right to her thirds or distributive share under the statute may be barred by a settlement made before marriage expressly in lieu of her share in her husband's estate; and this notwithstanding her infancy, if the settlement is made with the approbation of her guardians. (2 Eden, 60; 4 Br. C. C. 506; see 1 You. & C. 28). If the husband by his will gives a legacy or other benefit to his wife in lieu of her distributive share, this does not exclude her from her share of any legacy which fails by lapse or by being void. (3 Ves. 332; 10 Id. 17.)

(56) See 8 Jurist, 69. A brother or sister is of the same degree as a grandfather or grandmother, but is preferred by our law. "Between brother and brother there is but one degree." (3 Atk. 762, vide ante, p. 226, n.)

(57) The word in the statute is "children." It has been held to apply for the benefit of brothers and sisters of the half blood, (1 Myl. & K. 665). So, it was applied where the intestate died, leaving a widow and no children; the widow taking one moiety, and the intestate's brothers and sisters and mother taking the other. (2 P. Wms. 344). So, it applies where there is no surviving brother or sister, but only

in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions[58].

It is obvious to observe, how near a resemblance this statute of distributions bears to our antient English law, *de rationabili parte bonorum;* spoken of at the beginning of this

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nephews and nieces. (1 Atk. 455). And, in the same case, it was held, that the representatives of brothers and sisters could not be carried beyond their children, although the statute of James 2 contains no such limitation in words.

(58) The next of kin, who are to have the benefit of the statute of distribution, must be ascertained according to the computation of the civil law, including the relations both on the paternal and maternal sides. (Toller, 382-3). And when relations are thus found who are distant from the intestate by an equal number of degrees, they will share the personal property equally, although they are relations to the intestate of very different denominations, and perhaps not relations to each other. As if the next of kin of the intestate are great uncles or aunts, first cousins, and great nephews or nieces, these being all related to the intestate in the fourth degree, will all be admitted to an equal distributive share of his personal property. There is only one exception to this rule, *viz.* where the nearest relations are a grandfather or grandmother, and brothers or sisters; although all these are related in the second degree, yet the former shall not participate with the latter; for which singular exception it does not appear that any good reason can be given. (3 Atk. 762). No difference is made between the whole and half blood in the distribution of personal property.

A curious question was agitated some time ago respecting the right to the administration. General Stanwix and an only daughter were lost together at sea, and it was contended that it was a rule of the civil law, that when a parent and child perished together, and the priority of their deaths is unknown, it shall be presumed that the child survives the parent. And by this rule the right to the personal estate of the general would have vested in the daughter, and by her death in her next of kin, who on the part of the mother was a different person from the next of kin to her father. But this being only an application for the administration, and not for the interest under the statute of distribution, the court declined giving a judgment upon that question. (1 Bl. R. 640). And it does not appear that that point was ever determined in the spiritual courts. (See Fearne, Posth. W. p. 37; 1 You. & C. C. C. 121). But I should be inclined to think that our courts would require more than presumptive evidence to support a claim of this nature. And in 6 East, 82, it is said, that Lord Mansfield required the jury to find whether the general or his daughter survived; but it is not stated upon what occasion. Some curious cases de commorientibus may be seen in Causes Celebres, 3 tom. 412, et seq. In one of which, where a father and son were slain together in a battle, and on the same day the daughter became a professed nun, it was determined that her civil death was prior to the death of her father and brother, and that the brother having arrived at the age of puberty, should be presumed to have survived his father.—[CHRISTIAN.]

chapter[u]; and which Sir Edward Coke[w] himself, though he doubted the generality of its restraint on the power of devising by will, held to be universally binding (in point of conscience at least) upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession *ab intestato*[x]; which, and because the act was also penned by an eminent civilian[y], has occasioned a notion that the parliament of England copied it from the Roman praetor: though, indeed, it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom from the time of king Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. So, likewise, there is another part of the statute of distributions, where directions are given that no child of the intestate (except his heir-at-law) on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but, if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal[59]. This just and equitable provision hath been also said to be derived from the *collatio bonorum* of the imperial law[z]: which it certainly resembles in some points, though it

Hotchpot.

[517]

[u] Page 492.

[w] 2 Inst. 33. See 1 P. Wms. 8.

[x] The general rule of such successions was this: 1. The children or lineal descendants in equal portions. 2. On failure of these, the parents or lineal ascendants, and with them the brethren or sisters of the whole blood, or, if the parents were dead, all the brethren and sisters, together with the representatives of a brother or sister deceased. 3. The next collateral relations in equal degree. 4. The husband or wife of the deceased. Ff. 38. 15. 1. Nov. 118, c. 1, 2, 3; 127, c. 1.

[y] Sir Walter Walker; Lord Raym. 574.

[z] Ff. 37. 6. 1.

(59) This provision only applies when there is an actual intestacy. If the deceased made a will, and appointed an executor, any undisposed-of residue will be divided among the next of kin, without regard to any advancement. (14 Ves. 324). The representatives of a deceased child, who has been advanced, must bring the amount into distribution. (2 P. Wms. 560). The clause extends only to intestate *fathers*, (2 P. Wms. 357), and does not extend to benefit the widow. (8 Ves. 51).

differs widely in others. But it may not be amiss to observe, that, with regard to goods and chattels, this is part of the antient custom of London, of the province of York, and of our sister kingdom of Scotland: and, with regard to lands descending in co-parcenary, that it hath always been, and still is, the common law of England, under the name of *hotchpot* [a].

Before I quit this subject, I must, however, acknowledge, that the doctrine and limits of representation laid down in the statute of distributions seem to have been principally borrowed from the civil law: whereby it will sometimes happen, that personal estates are divided *per capita*, and sometimes *per stirpes;* whereas the common law knows no other rule of succession but that *per stirpes* only [b]. They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure repraesentationis*, in the right of another person. As, if the next of kin be the intestate's three brothers, A., B., and C.; here his effects are divided into three equal portions, and distributed *per capita*, one to each: but, if one of these brothers, A., had been dead, leaving three children, and another, B., leaving two; then the distribution must have been *per stirpes; viz.* one third to A.'s three children, another third to B.'s two children; and the remaining third to C. the surviving brother: yet, if C. had also been dead, without issue, then A.'s and B.'s five children, being all in equal degree to the intestate, would take in their own rights *per capita; viz.* each of them one fifth part [c 60].

[a] See ch. 12, page 191. [b] See ch. 14, page 217.
[c] Prec. Chanc. 54.

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(60) There is no representation or distribution *per stirpes* but among the immediate descendants of the intestate, and the children of his brothers and sisters; for the statute has expressly declared that no representation shall be admitted among collaterals, after brother's and sister's children. (s. 7). If therefore A., the brother of the intestate, be dead, leaving only grandchildren, and B. be dead, leaving children, and C. still be living, the grandchildren of A. shall have no share, but one-half will be given to the children of B., and the other half to C. (1 P. Wms. 25). If the intestate has a mother living, and brother's or sister's children, they shall take *per stirpes* with the mother, who shall have in such case the same share as a brother

Customs of London and York.

The statute of distributions expressly excepts and reserves the customs of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates' effects. So that, though in those places the restraint of devising is removed by the statutes formerly mentioned [d], their antient customs remain in full force, with respect to the estates of intestates [61]. I shall, therefore, conclude this chapter, and with it the present book, with a few remarks on those customs.

In the first place we may observe, that, in the city of London [e], and province of York [f], as well as in the kingdom of Scotland [g], and probably also in Wales, (concerning which there is little to be gathered, but from the statute 7 & 8 W. III. c. 38), the effects of the intestate, after payment of his debts, are in general divided according to the antient universal doctrine of the *pars rationabilis*. If the deceased leaves a widow and children, his substance (deducting for the widow's her apparel and the furniture of her bed-chamber, which in London is called the *widow's chamber*) is divided into three parts; one of which belongs to the widow, another to the children, and the third to the administrator: if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other [h]; if neither widow nor child, the administrator shall have the whole [i]. And this portion, or *dead man's* part, the adminis-

[d] Page 493.
[e] Lord Raym. 1329.
[f] 2 Burn, Eccl. Law, 746.
[g] Ibid. 782.
[h] 1 P. Wms. 341. Salk. 246.
[i] 2 Show. 175.

or sister. (1 Atk. 458). An aunt's child, or a cousin, cannot take by representation with an uncle, for as a nephew's child cannot take by representation, so a collateral equally remote shall not be admitted to take by representation with a nearer kinsman. (1 P. Wms. 594).—[CHRISTIAN.]

(61) That is to say, intestates at law. When an executor is appointed, there is no intestacy at law; and whatever personal estate is undisposed of, is distributable under the statute, and not by the custom. (Turn. & R. 255; 1 Russ. 416). But it seems to be otherwise as to the undisposed-of residue under a will by which no executor is appointed. (Mosel. 303).

The custom of London follows the person of the freeman; (1 Vern. 180; 1 Sim. 18; 1 B. P. C. 253); that of York binds the estate of residents only. (5 Ves. 760).

Grandchildren are not entitled to any distributive share under the custom of London. (2 Salk. 426; 1 P. Wms. 341).

Customs of London and York.

trator was wont to apply to his own use [k], till the statute 1 Jac. II. c. 17, declared that the same should be subject to the statute of distributions. So that if a man dies worth 1800*l.* personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom and two by the statute; and each of the children five, three by the custom and two by the statute: if he leaves a widow and one child,

[519]

she shall still have eight parts, as before; and the child shall have ten, six by the custom and four by the statute: if he leaves a widow and no child, the widow shall have three fourths of the whole, two by the custom and one by the statute; and the remaining fourth shall go by the statute to the next of kin. It is also to be observed, that, if the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity, with regard to the custom only [l]; but she shall be entitled to her share of the dead man's part under the statute of distributions, unless barred by special agreement [m]. And if any of the children are advanced by the father, in his lifetime, with any sum of money, (not amounting to their full proportionable part), they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any benefit under the custom [n]: but, if they are fully advanced, the custom entitles them to no farther dividend [o] [62].

Hotchpot.

Thus far in the main the customs of London and of York agree; but, besides certain other less material variations, there are two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age

[k] 2 Freem. 85. 1 Vern. 133.
[l] 2 Vern. 665. 3 P. Wms. 16.
[m] 1 Vern. 15. 2 Chanc. Rep. 252.
[n] 2 Freem. 279. 1 Equ. Cas. Abr. 155. 2 P. Wms. 526.
[o] 2 P. Wms. 527.

(62) The advancement, having been applied in satisfaction or reduction of the share under the custom, (and in augmentation of the shares of the other children, not of the dead man's part, (9 Ves. 460)), is, of course, not regarded in the distribution of the dead man's share under the statute; unless, perhaps, the amount advanced exceeds the customary share, and then only (if at all) as to the excess. (3 Atk. 214; 2 Vern. 273; see 2 Roper, H.& W. 10).

of twenty-one, before which they cannot dispose of it by testament [p]; and, if they die under that age, whether sole or married, their share shall survive to the other children; but after the age of twenty-one, it is free from any orphanage custom, and, in case of intestacy, shall fall under the statute of distributions [q] [63]. The other, that in the province of York, the heir at common law, who inherits any land either in fee or in tail, is excluded from any filial portion or reasonable part [r] [64]. But, notwithstanding these provincial variations, the customs appear to be substantially one and the same. And, as a similar policy formerly prevailed in every part of the island, we may fairly conclude the whole to be of British original; or, if derived from the Roman [520] law of successions, to have been drawn from that fountain much earlier than the time of Justinian, from whose constitutions in many points (particularly in the advantages given to the widow) it very considerably differs; though it is not improbable that the resemblances which yet remain may be owing to the Roman usages; introduced in the time of Claudius Caesar, who established a colony in Britain to instruct the natives in legal knowledge [s]; inculcated and diffused by Papinian, who presided at York as *praefectus praetorio*, under the emperors Severus and Caracalla [t]; and continued by his successors till the final departure of the Romans in the beginning of the fifth century after Christ.

[p] 2 Vern. 558.
[q] Prec. Chanc. 537.
[r] 2 Burn, 754.
[s] Tacit. Annal. l. 12, c. 32.
[t] Selden, in Fletam, cap. 4, § 3.

(63) See 6 Jurist, 885, where Sir L. Shadwell, V. C., acted upon a certificate of the Lord Mayor and Aldermen of London, "that, by the custom of the city, where there are several orphan children of a freeman who dies intestate, the share which any one may take by reason of surviving a child that dies an infant survives among the other children, in case of the death of the party to whom it has come under the age of twenty-one years; and if there be an accumulation of interest upon an orphanage share, the accumulation survives in the same manner."

(64) Another advancement in land is regarded by the custom of York, but not by that of London. (2 Vern. 375; 2 P. Wms. 274).

APPENDIX.

No. I.

No. I.

VETUS CARTA FEOFFAMENTI.

SCIANT presentes et futuri, quod ego Williemus filius Willielmi de Segenho, dedi, concessi, et hac presenti cartâ meâ confirmavi, Johanni quondam filio Johannis de Saleford, pro quâdam summâ pecunie quam michi dedit pre manibus, unam acram terre mee arabilis, jacentum in campo de Saleford, juxta terram quondam Richardi de la Mere: Habendam et Tenendam totam predictam acram terre, cum omnibus ejus pertinentiis, prefato Johanni, et heredibus suis, et suis assignatis, de capitalibus dominis feodi: Reddendo et faciendo annuatim eisdem dominis capitalibus servitia inde debita et consueta; Et ego predictus Willielmus, et heredes mei, et mei assignati, totam predictam acram terre, cum omnibus suis pertinentiis, predicto Johanni de Saleford, et heredibus suis, et suis assignatis, contra omnes gentes warrantizabimus in perpetuum. In cujus rei testimonium huic presenti carte sigillum meum apposui; His testibus, Nigello de Saleford, Johanne de Seybroke, Radulpho clerico de Saleford, Johanne molendario de eâdem villâ, et aliis. Data apud Saleford die Veneris proximo ante festum sancte Margarete virginis, anno regni regis EDWARDI filii regis EDWARDI sexto.

Premises.

Habendum, et Tenendum.

Reddendum.

Warranty.

Conclusion.

L. S.

Livery of seisin endorsed.

Memorandum, quod die et anno infrascriptis plena et pacifica seisina acre infraspecificate, cum pertinentiis, data et deliberata fuit per infranominatum Willielmum de Segenho infranominato Johanni de Saleford, in propriis personis suis, secundum tenorem et effectum carte infrascripte, in presentia Nigelli de Saleford Johannis de Seybroke, et aliorum.

No. II.

No. II.

A MODERN CONVEYANCE BY LEASE AND RELEASE.

Sect. 1. Lease, or Bargain and Sale, for a Year.

Premises. THIS Indenture, made the third day of September, in the twenty-first year of the reign of our sovereign lord GEORGE the second by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one

Parties. thousand seven hundred and forty-seven, between Abraham Barker of Dale Hall in the county of Norfolk, esquire, and Cecilia his wife, of the one part, and David Edwards, of Lincoln's Inn in the county of Middlesex, esquire, and Francis Golding of the city of Norwich, clerk, of the other part, witnesseth; that the said Abraham Barker and Cecilia his

Nominal consideration. wife, in consideration of five shillings* of lawful money of Great Britain to them in hand paid by the said David Edwards and Francis Golding at or before the ensealing and delivery of these presents (the receipt whereof is hereby acknowledged), and for other good causes and considerations them the said Abraham Barker and Cecilia his wife hereunto

Bargain and sale. specially moving, have bargained and sold, and by these presents do, and each of them doth, bargain and sell, unto the said David Edwards and

Parcels. Francis Golding, their executors, administrators, and assigns, All that the capital messuage, called Dale Hall in the parish of Dale in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's farm, containing by estimation

General words. five hundred and forty acres, be the same more or less, together with all and singular houses, dovehouses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and parcel thereof:

Habendum. To have and to hold the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein-before mentioned or intended to be bargained and sold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, from the day next before the day

* This consideration is essential to the operation of the deed as a bargain and sale (ante, p. 338). The consideration raised the use in equity (as it now raises the trust); and the courts of law, in inquiring whether any use has been created that the Statute of Uses will convert into a legal estate, take notice of any valuable consideration (such, even, as a peppercorn rent), without regard to its adequacy or amount. The nominal consideration is never paid; but the parties, having, by writing under seal, declared that it has been paid, are estopped from ever denying this solemn assertion.

of the date of these presents, for and during, and unto the full end and term of, one whole year from thence next ensuing and fully to be completed and ended: Yielding and paying therefore unto the said Abraham Barker and Cecilia his wife, and their heirs and assigns, the yearly rent of one peppercorn at the expiration of the said term, if the same shall be lawfully demanded*: To the intent and purpose that, by virtue of these presents, and of the statute for transferring uses into possession, the said David Edwards and Francis Golding may be in the actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premises, and of every part and parcel thereof, to them, their heirs and assigns; to the uses and upon the trusts thereof to be declared by another indenture, intended to bear date the next day after the day of the date hereof. In witness whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

No. II.

Reddendum.

Intent.

Conclusion.

Sealed, and delivered, (being first duly stamped †), in the presence of
George Carter.
William Browne.

Abraham Barker. (L. S.)
Cecilia Barker. (L. S.)
David Edwards. (L. S.)
Francis Golding. (L. S.)

Sect. 2. Deed of Release.

This Indenture of five parts, made the fourth day of September, in the twenty-first year of the reign of our sovereign lord George the second, by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven, between Abraham Barker, of Dale Hall, in the county of Norfolk, esquire, and Cecilia his wife, of the first part; David Edwards, of Lincoln's Inn, in the county of Middlesex, esquire, executor of the last will and testament of Lewis Edwards, of Cowbridge, in the county of Glamorgan, gentleman, his late father, deceased, and Francis Golding, of the city of Norwich, clerk, of the second part; Charles Browne, of Enstone, in the county of Oxford, gentleman, and Richard More, of the city of Bristol, merchant, of the third part; John Barker, esquire, son and heir apparent of the said Abraham Barker, of the fourth part; and Katherine Edwards, spinster, one of the sisters of the said David Edwards, of the fifth part. Whereas a marriage is intended, by the permission of God, to be shortly had and solemnized between the said John Barker and Katherine Edwards: Now this Indenture witnesseth, that in consideration ‡ of the said in-

Premises.

Parties.

Recital.

Consideration.

* This reservation of a nominal rent is quite superfluous. But had the nominal consideration been omitted, this would have been a sufficient consideration to raise the use.

† This statement is altogether immaterial. Although a deed cannot, as a matter of course, be stamped after execution, the stamp will generally be affixed on payment of a penalty; and the want of a stamp by no means destroys the validity of a deed, although (which in practice is much the same thing) it prevents it from being received in evidence.

‡ In this deed the seisin is transferred at the common law by way of release, and not (as in the preceding deed) by virtue of the Statute of Uses. The uses declared upon this seisin do not, therefore, require to be supported by any consideration (ante, p. 327). But, as a good or valuable consideration (such as marriage or money) will often support a conveyance against claims which would prevail against a merely voluntary conveyance, it is usual and proper, except under particular circumstances, to state in every deed the consideration or inducements to its being made.

No. II.

tended marriage, and of the sum of five thousand pounds, of good and lawful money of Great Britain, to the said Abraham Barker (by and with the consent and agreement of the said John Barker and Katherine Edwards, testified by their being parties to, and their sealing and delivery of, these presents), by the said David Edwards in hand paid at or before the ensealing and delivery hereof, being the marriage portion of the said Katherine Edwards, bequeathed to her by the last will and testament of the said Lewis Edwards, her late father, deceased; the receipt and payment whereof the said Abraham Barker doth hereby acknowledge, and thereof, and of every part and parcel thereof, they the said Abraham Barker, John Barker, and Katherine Edwards, do, and each of them doth, release, acquit, and discharge the said David Edwards, his executors and administrators, for ever by these presents: and for providing a competent jointure and provision of maintenance for the said Katherine Edwards, in case she shall, after the said intended marriage had, survive and overlive the said John Barker, her intended husband: and for settling and assuring the capital messuage, lands, tenements, and hereditaments hereinafter mentioned, and to such uses, and upon such trusts as are hereinafter expressed and declared: and for and in consideration of the sum of five shillings, of lawful money of Great Britain, to the said Abraham Barker and Cecilia his wife in hand paid by the said David Edwards and Francis Golding, and of ten shillings of like lawful money to them also in hand paid by the said Charles Browne and Richard More, at or before the ensealing and delivery hereof (the several receipts whereof are hereby respectively acknowledged), they the said Abraham Barker and Cecilia his wife, have, and each of them hath, granted, bargained, sold, released, and confirmed, and by these presents do, and each of them doth, grant, bargain, sell, release, and confirm unto the said David Edwards and Francis Golding, their heirs and assigns, All that the capital messuage called Dale Hall, in the parish of Dale, in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale, called or known by the name of Wilson's Farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; (all which said premises are now in the actual possession of the said David Edwards and Francis Golding, by virtue of a bargain and sale to them thereof made to the said Abraham Barker and Cecilia his wife, for one whole year, in consideration of five shillings to them paid by the said David Edwards and Francis Golding, in and by one indenture bearing date the day next before the day of the date hereof, and by force of the statute for transferring uses into possession); and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and every part and parcel thereof, and also all the estate, right, title, interest, trust, property, claim, and demand whatsoever, both at law and in equity, of them the said Abraham Barker and Cecilia his wife, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises: To have and to hold the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein-before mentioned to be hereby

Nominal consideration.

Release.

Parcels.

General words.

Mention of bargain and sale.

Habendum.

No. II.

granted and released, with their and every of their appurtenances, unto the said David Edwards and Francis Golding, their heirs and assigns, to such uses, upon such trusts, and to and for such intents and purposes as are hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, to the use and behoof of the said Abraham Barker and Cecilia his wife, according to their several and respective estates and interests therein, at the time of, or immediately before, the execution of these presents, until the solemnization of the said intended marriage: and from and after the solemnization thereof, to the use and behoof of the said John Barker, for and during the term of his natural life; without impeachment of or for any manner of waste: and from and after the determination of that estate, then to the use of the said David Edwards and Francis Golding, and their heirs, during the life of the said John Barker, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated and destroyed, and for that purpose to make entries, or bring actions, as the case shall require; but nevertheless to permit and suffer the said John Barker, and his assigns, during his life to receive and take the rents and profits thereof and of every part thereof to and for his and their own use and benefit: and from and after the decease of the said John Barker, then to the use and behoof of the said Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction of her dower and thirds at common law, which she can, or may have or claim, of, in, to, or out of, all and every, or any, of the lands, tenements, and hereditaments, whereof or wherein the said John Barker now is, or at any time or times hereafter during the coverture between them shall be, seised of any estate of freehold or inheritance: and from and after the decease of the said Katherine Edwards, or other sooner determination of the said estate, then to the use and behoof of the said Charles Browne and Richard More, their executors, administrators, and assigns, for and during, and unto the full end and term of, five hundred years from thence next ensuing and fully to be complete and ended, without impeachment of waste: upon such trusts nevertheless, and to and for such intents and purposes, and under and subject to such provisoes and agreements, as are hereinafter mentioned, expressed, and declared of and concerning the same: and from and after the end, expiration, or other sooner determination of the said term of five hundred years, and subject thereunto, to the use and behoof of the first son of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, and of the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and of all and every other the son and sons of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs of his or their body or bodies issuing: and for default of such issue, then to the use and behoof of all and every the daughter and daughters of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, to be equally divided between them (if more than one), share and share alike, as tenants in common, and not as joint-tenants, and of the several and respective heirs of the body and bodies of all and

To the use of the grantors till marriage.

Then of the husband for life, *sans waste:*

Remainder to trustees to preserve contingent remainders:

Remainder to the wife for life, for her jointure, in bar of dower:

Remainder to other trustees for a term, upon trusts after mentioned:

Remainder to the first and other sons of the marriage in tail.

Remainder to the daughters,

as tenants in common, in tail;

No. II.

Remainder to the husband in tail;

Remainder to the husband's mother in fee.

The trust of the term declared;

to raise portions for younger children.

Payable at certain times,

with maintenance at the rate of 4 per cent.

and benefit of survivorship.

If no such child,

or if all die,

or if the portions be raised,

or paid,

or secured by the person next in remainder;

every such daughter and daughters lawfully issuing: and for default of such issue, then to the use and behoof of the heirs of the body of him the said John Barker lawfully issuing: and for default of such heirs, then to the use and behoof of the said Cecilia the wife of the said Abraham Barker, and of her heirs and assigns for ever. And as to, for, and concerning the term of five hundred years hereinbefore limited to the said Charles Browne and Richard More, their executors, administrators, and assigns, as aforesaid, it is hereby declared and agreed by and between all the said parties to these presents, that the same is so limited to them upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes and agreements hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, in case there shall be an eldest or only son, and one or more other child or children of the said John Barker on the body of the said Katherine his intended wife to be begotten, then upon trust that they the said Charles Browne and Richard More, their executors, administrators, and assigns, by sale or mortgage of the said term of five hundred years, or by such other ways and means as they or the survivor of them, or the executors or administrators of such survivor, shall think fit, shall and do raise and levy, or borrow and take up at interest, the sum of four thousand pounds of lawful money of Great Britain, for the portion or portions of such other child or children (besides the eldest or only son) as aforesaid, to be equally divided between them (if more than one) share and share alike; the portion or portions of such of them as shall be a son or sons to be paid at his or their respective age or ages of twenty-one years; and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen. And upon this further trust, that in the mean time and until the same portions shall become payable as aforesaid, the said Charles Browne and Richard More, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid, raise and levy such competent yearly sum and sums of money for the maintenance and education of such child or children, as shall not exceed in the whole the interest of their respective portions, after the rate of four pounds in the hundred yearly. Provided always, that in case any of the same children shall happen to die before his, her, or their portions shall become payable as aforesaid, then the portion or portions of such of them so dying shall go and be paid unto and be equally divided among the survivor or survivors of them, when and at such time as the original portion or portions of such surviving child or children shall become payable as aforesaid. Provided also, that in case there shall be no such child or children of the said John Barker, on the body of the said Katherine his intended wife begotten, besides an eldest or only son; or in case all and every such child or children shall happen to die before all or any of their said portions shall become due and payable as aforesaid; or in case the said portions, and also such maintenance as aforesaid, shall by the said Charles Browne and Richard More, their executors, administrators, or assigns, be raised and levied by any of the ways and means in that behalf afore-mentioned; or in case of the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises expectant upon the said term of five hundred years, shall be paid, or well and duly secured to be paid, according to the true intent and meaning of these presents; then and in any of the said cases, and at all times thenceforth, the said term of five hundred years, or so much thereof as shall remain unsold or

No. II.

undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and purposes, anything herein contained to the contrary thereof in any wise notwithstanding. Provided also, and it is hereby further declared and agreed by and between all the said parties to these presents, that in case the said Abraham Barker or Cecilia his wife, at any time during their lives, or the life of the survivor of them, with the approbation of the said David Edwards and Francis Golding, or the survivor of them, or the executors and administrators of such survivor shall settle, convey, and assure other lands and tenements of an estate of inheritance in fee-simple, in possession in some convenient place or places within the realm of England, of equal or better value than the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, and in lieu and recompense thereof, unto and for such and the like uses, intents, and purposes, and upon such and the like trusts, as the said capital messuage, lands, tenements, hereditaments, and premises are hereby settled and assured unto and upon, then and in such case, and at all times from thenceforth, all and every the use and uses, trust and trusts, estate and estates herein-before limited, expressed and declared of or concerning the same, shall cease, determine, and be utterly void to all intents and purposes; and the same capital messuage, lands, tenements, hereditaments, and premises, shall from thenceforth remain and be to and for the only proper use and behoof of the said Abraham Barker or Cecilia his wife, or the survivor of them, so settling, conveying, and assuring such other lands and tenements as aforesaid, and of his or her heirs and assigns for ever; and to and for no other use, intent, or purpose whatsoever; anything herein contained to the contrary thereof in anywise notwithstanding. And for the considerations aforesaid, and for barring all estates-tail, and all remainders or reversions thereupon expectant or depending, if any be now subsisting and unbarred or otherwise undetermined, of and in the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, or mentioned to be hereby granted and released, or any of them, or any part thereof, the said Abraham Barker for himself and the said Cecilia his wife, his and her heirs, executors, and administrators, and the said John Barker for himself, his heirs, executors, and administrators, do, and each of them doth, respectively covenant, promise, and grant, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, by these presents, that they the said Abraham Barker and Cecilia his wife, and John Barker, shall and will, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, acknowledge and levy, before his majesty's justices of the court of common pleas at Westminster, one or more fine or fines, sur cognizance de droit, come ceo, &c. with proclamations according to the form of the statutes in that case made and provided, and the usual course of fines in such cases accustomed, unto the said David Edwards, and his heirs, of the said capital messuage, lands, tenements, hereditaments, and premises, by such apt and convenient names, quantities, qualities, number of acres, and other descriptions to ascertain the same, as shall be thought meet; which said fine or fines, so as aforesaid, or in any other manner levied and acknowledged, or to be levied and acknowledged, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and are hereby declared by all the said parties to these presents to be and enure, to the use and behoof of the said David Edwards, and his heirs and assigns; to the intent and purpose that the said David Edwards may by virtue of the

the residue of the term to cease.

Condition, that the uses and estates hereby granted shall be void, on settling other lands of equal value in recompense.

Covenant to levy a fine;

No. II.

in order to make a tenant to the præcipe, that a recovery may be suffered;

said fine or fines so covenanted and agreed to be levied as aforesaid, be and become perfect tenant of the freehold of the said capital messuage, lands, tenements, hereditaments, and all other the premises, to the end that one or more good and perfect common recovery or recoveries may be thereof had and suffered, in such manner as is hereinafter for that purpose mentioned. And it is hereby declared and agreed by and between all the said parties to these presents, that it shall and may be lawful to and for the said Francis Golding, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, to sue forth and prosecute out of his majesty's high court of chancery one more writ or writs of entry sur disseisin en le post, returnable before his majesty's justices of the court of Common Pleas at Westminster, thereby demanding by apt and convenient names, quantities, qualities, number of acres, and other descriptions, the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards; to which said writ, or writs, of entry he the said David Edwards shall appear gratis, either in his own proper person, or by his attorney thereto lawfully authorized, and vouch over to warranty the said Abraham Barker and Cecilia his wife, and John Barker; who shall also gratis appear in their proper persons, or by their attorney or attorneys, thereto lawfully authorized, and enter into the warranty, and vouch over to warranty the common vouchee of the same court; who shall also appear, and after imparlance shall make default; so as judgment shall and may be thereupon had and given for the said Francis Golding to recover the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards, and for him to recover in value against the said Abraham Barker and Cecilia his wife, and John Barker, and for them to recover in value against the said common vouchee, and that execution shall and may be thereupon awarded, and had accordingly, and all and every other act and thing be done and executed, needful and requisite for the suffering and perfecting of such common recovery or recoveries, with vouchers as aforesaid. And it is hereby further declared and agreed by and between all the said parties to these presents, that immediately from and after the suffering and perfecting of the said recovery or recoveries, so as aforesaid, or in any other manner, or at any other time or times, suffered or to be suffered, as well these presents and the assurance hereby made, and the said fine or fines, so covenanted to be levied as aforesaid, as also the said recovery or recoveries, and also all and every other fine or fines, recovery and recoveries, conveyances, and assurances in the law whatsoever heretofore had, made, levied, suffered or executed, or hereafter to be had, made, levied, suffered or executed, of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by and between the said parties to these presents or any of them, or whereunto they or any of them are or shall be parties or privies, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and the recoveror or recoverors in the said recovery or recoveries named or to be named, and his or their heirs, shall stand and be seised of the said capital messuage, lands, tenements, hereditaments, and premises, and of every part and parcel thereof, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes, limitations, and agreements hereinbefore mentioned, expressed, and declared, of and concerning the same. And the said Abraham Barker, party hereunto, doth hereby for himself, his heirs, executors, and administrators, further covenant, promise, grant, and agree, to and with the said David

to enure

to the previously declared uses in this deed.

Other covenants;

No. II.

Edwards and Francis Golding, their heirs, executors, and administrators, in manner and form following; that is to say, that the said capital messuage, lands, tenements, hereditaments, and premises, shall and may at all times hereafter remain, continue, and be, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, hereinbefore mentioned, expressed, and declared of and concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed accordingly, without any lawful let or interruption of or by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs or assigns, or of or by any other person or persons lawfully claiming or to claim from, by, or under, or in trust for him, her, them, or any of them; or from by, or under, his or her ancestors, or any of them; and shall so remain, continue, and be, free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise, by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered, by the said Abraham Barker or Cecilia his wife, or by his or her ancestors, or any of them, or by his, her, their, or any of their act, means, assent, consent or procurement; And moreover, that he the said Abraham Barker and Cecilia his wife, parties hereunto, and his or her heirs, and all other persons having or lawfully claiming, or which shall or may have or lawfully claim, any estate, right, title, trust, or interest, at law or in equity, of, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by or under or in trust for him, her, them, or any of them, or by or under his or her ancestors, or any of them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying, settling, and assuring of the same capital messuage, lands, tenements, hereditaments, and premises, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, hereinbefore mentioned, expressed, and declared, of and concerning the same, as by the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, or their or any of their counsel learned in the law, shall be reasonably advised, devised, or required; so as such further assurances contain in them no further or other warranty or covenants than against the person or persons, his, her, or their heirs, who shall make or do the same; and so as the party or parties, who shall be requested to make such further assurances, be not compelled or compellable, for making or doing thereof, to go and travel above five miles from his, her, or their then respective dwellings, or places of abode. Provided lastly and it is hereby further declared and agreed by and between all the parties to these presents, that it shall and may be lawful to and for the said Abraham Barker and Cecilia his wife, John Barker and Katherine his intended wife, and David Edwards, at any time or times hereafter, during their joint lives, by any writing or writings under their respective hands and seals, and attested by two or more

for quiet enjoyment,

free from incumbrances;

and for further assurance.

Power of revocation.

No. III.

credible witnesses, to revoke, make void, alter, or change all and every or any the use and uses, estate and estates, herein and hereby before limited and declared, or mentioned or intended to be limited and declared, of and in the capital messuage, lands, tenements, hereditaments, and premises aforesaid, or of and in any part or parcel thereof, and to declare new and other uses of the same, or of any part or parcel thereof, any thing herein contained to the contrary thereof in anywise notwithstanding. In witness whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Conclusion.

Sealed, and delivered, (being first duly stamped), in the presence of
George Carter.
William Browne.

Abraham Barker. (L. S.)
Cecilia Barker. (L. S.)
David Edwards. (L. S.)
Francis Golding. (L. S.)
Charles Browne. (L. S.)
Richard More. (L. S.)
John Barker. (L. S.)
Katherine Edwards. (L. S.)

No. III.

No. III.

AN OBLIGATION, OR BOND, WITH CONDITION FOR THE PAYMENT OF MONEY.

KNOW all men by these presents, that I David Edwards of Lincoln's Inn in the county of Middlesex, esquire, am held and firmly bound to Abraham Barker of Dale Hall in the county of Norfolk, esquire, in ten thousand pounds of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September in the twenty-first year of the reign of our sovereign lord GEORGE the second, by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven.

The condition of this obligation is such, that if the above-bounden David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above-named Abraham Barker, his executors, administrators, or assigns, the full sum of five thousand pounds of lawful British money, with lawful interest for the same, on the fourth day of March next ensuing the date of the above written obligation, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed, and delivered, (being first duly stamped), in the presence of
George Carter.
William Browne.

David Edwards. (L. S.)

No. IV.

A FINE OF LANDS SUR COGNIZANCE DE DROIT, COME CEO, &c.

Sect. 1. Writ of Covenant; or Praecipe.

GEORGE the second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. Command Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John, that they appear before our justices at Westminster, from the day of saint Michael in one month, to shew wherefore they have not done it: and have you there the summoners, and this writ. Witness ourself at Westminster the ninth day of October, in the twenty-first year of our reign.

Pledges of prosecution,	John Doe. Richard Roe.	Summoners of the within named Abraham, Cecilia, and John,	John Den. Richard Fen.	Sheriff's return.

Sect. 2. The Licence to agree.

Norfolk, to wit. David Edwards, esquire, gives to the lord the king ten marks, for licence to agree with Abraham Barker, esquire, of a plea of covenant of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances in Dale.

Sect. 3. The Concord.

And the agreement is such, to wit, that the aforesaid Abraham, Cecilia, and John have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

No. IV.

SECT. 4. THE NOTE OR ABSTRACT.

Norfolk, } Between David Edwards, esquire, complainant, and
to wit. } Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them: to wit, that the said Abraham, Cecilia, and John have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves, and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

SECT. 5. THE FOOT, CHIROGRAPH, OR INDENTURES OF THE FINE.

Norfolk, } This is the final agreement, made in the court of the lord
to wit. } the king at Westminster, from the day of saint Michael in one month, in the twenty-first year of the reign of the lord GEORGE the second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, before John Willes, Thomas Abney, Thomas Burnet, and Thomas Birch, justices, and other faithful subjects of the lord the king then there present, between David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them in the said court; to wit, that the aforesaid Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David, and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

SECT. 6. PROCLAMATIONS, ENDORSED UPON THE FINE, ACCORDING TO THE STATUTES.

The first proclamation was made the sixteenth day of November, in the term of Saint Michael, in the twenty-first year of the king within-written.

The second proclamation was made the fourth day of February, in the term of Saint Hilary, in the twenty-first year of the king within-written. No. V.

The third proclamation was made the thirteenth day of May, in the term of Easter, in the twenty-first year of the king within-written.

The fourth proclamation was made the twenty-eighth day of June, in the term of the holy Trinity, in the twenty-second year of the king within-written.

No. V.

No. V.

A COMMON RECOVERY OF LANDS WITH DOUBLE* VOUCHER.

Sect. 1. Writ of Entry sur Disseisin in the Post; or Praecipe.

GEORGE the second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. Command David Edwards, esquire, that justly and without delay he render to Francis Golding, clerk, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, which he claims to be his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past, as he saith, and whereupon he complains that the aforesaid David deforceth him. And unless he shall so do, and if the said Francis shall give you security of prosecuting his claim, then summon by good summoners the said David, that he appear before our justices at Westminster on the octave of Saint Martin, to shew wherefore he hath not done it; and have you there the summoners, and this writ. Witness ourself at Westminster, the twenty-ninth day of October, in the twenty-first year of our reign.

Pledges of prosecution, John Doe. Richard Roe.

Summoners of the within named David, John Den. Richard Fen.

Sheriff's return.

Sect. 2. Exemplification of the Recovery Roll.

GEORGE the second, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to all to whom these our present letters shall come, greeting. Know ye, that among

* Note, that if the recovery be had with single voucher, the parts marked "thus" in sect. 2, are omitted.

No. V.

the pleas of land enrolled at Westminster, before Sir John Willes, knight, and his fellows, our justices of the bench, of the term of Saint Michael, in the twenty-first year of our reign, upon the fifty-second roll it is thus contained. Entry returnable on the octave of Saint Martin. Norfolk, to wit; Francis Golding, clerk, in his proper person demandeth against David Edwards, esquire, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value [* of six shillings and eight pence, and more, in rents, corn and grass :] and into which [the said David hath not entry, unless as aforesaid :] and thereupon he bringeth suit [and good proof]. And the said David in his proper person comes and defendeth his right, when [and where it shall behove him], and thereupon voucheth to warranty "John Barker, esquire; who is present here in court in "his proper person, and the tenements aforesaid with the appurte-"nances to him freely warranted [and prays that the said Francis "may count against him.] And hereupon the said Francis demandeth "against the said John, tenant by his own warranty, the tenements "aforesaid with the appurtenances, in form aforesaid, &c. And "whereupon he saith, that he himself was seised of the tenements "aforesaid with the appurtenances, in his demesne as of fee and right, "in time of peace, in the time of the lord the king that now is, by "taking the profits thereof to the value, &c. And into which, &c. "And thereupon he bringeth suit, &c. And the aforesaid John, "tenant by his own warranty, defends his right, when, &c. and there-"upon he further voucheth to warranty" Jacob Morland; who is present here in court in his proper person, and the tenements aforesaid, with the appurtenances, to him freely warranteth, &c. And hereupon the said Francis demandeth against the said Jacob, tenant by his own warranty, the tenements aforesaid, with the appurtenances, in form aforesaid, &c. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, &c. And into which, &c. And thereupon he bringeth suit, &c. And the aforesaid Jacob, tenant by his own warranty, defends his right, when, &c. And saith that the aforesaid Hugh did not disseise the aforesaid Francis of the tenements aforesaid, as the aforesaid Francis by his writ and count aforesaid above doth suppose: and of this he puts himself upon the country. And the aforesaid Francis thereupon craveth leave to imparl; and he hath it. And afterwards the aforesaid Francis cometh again here into court in this same term in his proper person, and the aforesaid Jacob, though solemnly called, cometh not again, but hath departed in contempt of the court, and maketh default. Therefore it is considered, that the aforesaid Francis do recover his seisin against the aforesaid David of the tenements aforesaid, with the appurtenances: and that the said David have of the land of the aforesaid "John, to the value [of the tenements aforesaid;] and further, that

Return.

Demand against the tenant.

Count.

Esples.

Defence of the tenant.

Voucher.

" Warranty.

" Demand " against the " vouchee.

" Count.

" Defence of " the vouchee.

" Second " voucher.

" Warranty."

Demand against the common vouchee.

Count.

Defence of the common vouchee.

Plea, *nul disseisin.*

Imparlance.

Default of the common vouchee.

Judgment for the demandant.

Recovery in value.

* The clauses between hooks are no otherwise expressed in the record than by an *&c.*

"the said John, have of the land of the said" Jacob to the value [of the tenements aforesaid.] And the said Jacob in mercy. And hereupon the said Francis prays a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have full seisin of the tenements aforesaid with the appurtenances: and it is granted unto him, returnable here without delay. Afterwards, that is to say, the twenty-eight day of November in this same term, here cometh the said Francis in his proper person; and the sheriff, namely Sir Charles Thompson, knight, now sendeth, that he by virtue of the writ aforesaid, to him directed, on the twenty-fourth day of the same month, did cause the said Francis to have full seisin of the tenements aforesaid with the appurtenances, as he was commanded. All and singular which premises, at the request of the said Francis, by the tenor of these presents we have held good to be exemplified. In testimony whereof we have caused our seal, appointed for sealing writs in the bench aforesaid, to be affixed to these presents. Witness Sir John Willes, knight, at Westminster, the twenty-eighth day of November, in the twenty-first year of our reign.

No. VI.

Amercement.

Award of the writ of seisin, and return.

Exemplification continued

Teste.

COOKE.

No. VI.

No. VI.

A MODERN MORTGAGE IN FEE, BY APPOINTMENT AND RELEASE, WITH POWER OF SALE.

THIS Indenture, made the first day of September, in the year of our Lord, 1844, Between John Smith, of Thorpe, in the county of Rutland, Esquire, of the one part; and Charles Green, of the same place, banker, of the other part. Whereas, by indentures of lease and release, the latter bearing date on or about the second day of March, 1839; and being expressed to be made between James Foot, of the first part; the said John Smith, of the second part; and Thomas Jones, of the third part, the messuage and hereditaments hereinafter described, were conveyed and assured to such uses, for such estate or estates, upon such trusts, and for such intents and purposes, as the said John Smith, at any time or times thereafter, or from time to time, by any deed or deeds, to be signed, sealed, and delivered by the said John Smith, in the presence of and to be attested by one witness or more, should direct or appoint; and, in default of such direction or appointment, to the use of the said John Smith and his assigns, during his natural life, without impeachment of waste; with remainder to the use of the said Thomas Jones, his executors and administrators*, during the life of the said John Smith, in trust for him and his assigns; with remainder to the use of the said John Smith, his heirs and assigns for

Parties.

Recital of conveyance to mortgagor to uses to prevent dower.

* An estate *pour autre vie* may be limited to the heir; but when it is vested in a trustee, it is better that it should be limited to the executors, in order to avoid the inconvenience which might occur from its vesting in an infant heir, on the death of the trustee. (Vide ante, p. 260, n. 2). The limitations here recited are the common limitations to prevent dower. (Vide ante, p. 136, n. 49).

No. VI.

Recital of agreement for loan.

ever. And whereas the said John Smith, having occasion for the sum of £900, hath requested the said Charles Green to lend and advance to him the said sum at interest, on security of the said hereditaments, which the said Charles Green hath agreed to do. Now this Indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the sum of £900 sterling, paid by the said Charles Green to the said John Smith, at or before the execution of these presents, (the receipt whereof the said John Smith doth hereby acknowledge, and from the same sum and every part thereof doth acquit, release, and for ever discharge the said Charles Green, his heirs, executors, administrators, and assigns), the said John Smith, by virtue and in exercise and execution of the above-recited power or authority, and of every other power and authority enabling him in this behalf, Doth, by this deed in writing, executed by him in the presence of the person whose name is hereupon indorsed as an attesting witness of the execution thereof by him, absolutely and irrevocably direct, limit, and appoint, that all and singular the messuage, lands, and hereditaments hereinafter described, with their rights, members, and appurtenances, shall thenceforth remain, continue, and be To the only proper use of the said Charles Green, his heirs and assigns for ever; subject, nevertheless, to the provisio for redemption hereinafter contained, And this Indenture further witnesseth, that, for the consideration aforesaid, the said John Smith, by these presents, made in pursuance of an Act of Parliament passed in the fourth year of the reign of Queen Victoria, intituled "An Act for rendering a release as effectual for the conveyance of freehold estates, as a lease and release by the same parties," doth grant, bargain, sell, and release, unto the said Charles Green, and his heirs, all that messuage or tenement [*description of the parcels*], together with all outhouses, edifices, buildings, ways, waters, water-courses, trees, woods, underwoods, hedges, ditches, fences, commons, rights, profits, privileges, easements, advantages, rights, members, and appurtenances whatsoever, to the said messuage, lands, and premises, or any part thereof respectively belonging or in anywise in fact or reputation appertaining, or now or at any time heretofore usually held, occupied, or enjoyed therewith; And also all the estate, right, title, interest, benefit, claim, and demand whatsoever, both at law and in equity, of the said John Smith, in, to, out of, or upon the said hereditaments and premises, and every part thereof; And also all deeds, papers, and writings, relating to or in anywise concerning the title of the said hereditaments and premises, or any part thereof, either alone or together with any other hereditaments of less value, now in the custody or possession of the said John Smith, or which he can procure without suit at law or in equity: To have and to hold the said messuage, hereditaments, and premises unto the said Charles Green and his heirs: To the only proper use of the said Charles Green, his heirs and assigns, for ever; subject nevertheless to the proviso or agreement for redemption of the said hereditaments next hereinafter contained:" (that is to say,) Provided always, and it is hereby agreed and declared, that if the said John Smith, his heirs, executors, administraters, or assigns, shall pay or cause to be paid unto the said Charles Green, his executors, administrators, or assigns, the sum of £900 sterling, with interest for the same after the rate of £5 per centum per annum, on the 1st day of December now next ensuing, without making any deduction out of the same sum and interest respectively for taxes, or on any other account whatsoever, then immediately thereupon the said Charles Green, his heirs or assigns, shall, at the request, costs, and charges of the said John Smith, his heirs or assigns, reconvey or reassure the said messuage, hereditaments, and

Testatum.

Appointment by mortgagor.

Further *testatum.*

Mortgagor releases to mortgagee.

General words.

All the estate.

All deeds.

Habendum.

Use.

Proviso for redemption.

No. VI.

premises unto and to the use of the said John Smith, his heirs or assigns, or in such other manner as he or they shall direct, free from all charges and incumbrances to be made or occasioned by the said Charles Green, his heirs and assigns, in the meantime. Provided also, and it is hereby agreed and declared, that in case default shall be made in the payment of the said principal and interest moneys, or any part thereof respectively, at the time and in manner aforesaid, and if the said Charles Green, his heirs, executors, administrators, or assigns, shall give to the said John Smith, his heirs or assigns, or leave at his or their usual or last known place or places of abode in England three calendar months' previous notice in writing, under the hand or hands of the said Charles Green, his heirs, executors, administrators or assigns, or some or one of them, of his or their intention to proceed to a sale of the said messuage, hereditaments, and premises, unless the principal and interest moneys hereby intended to be secured shall be paid at the expiration of the said notice, then it shall be lawful for the said Charles Green, his heirs or assigns, immediately thereupon, or at any time thereafter, so long as any part of the moneys hereby intended to be secured, shall remain unpaid, notwithstanding the acceptance of interest after such notice as aforesaid, and whether he or they shall or shall not have entered into the possession or receipt of the rents and profits as aforesaid, without the necessity of any consent or concurrence on the part of the said John Smith, his heirs or assigns, to sell and absolutely dispose of the said messuage, hereditaments and premises, or any part of the same, either together or in parcels, and either by public auction or by private contract, and under and subject to such special or other conditions and stipulations, relative to title or otherwise, as he or they shall think proper, with liberty to buy in the said hereditaments, or any part thereof, at any auction or auctions, and to re-sell the hereditaments so bought in at any future auction or by private contract, without being answerable for any loss, expense, or diminution of price which shall be consequent thereupon, and also (if deemed expedient) to rescind or vary the terms of any contract for sale which shall have been entered into, and to convey or assure the same hereditaments, when sold, unto the purchaser or purchasers thereof, or as he, she, or they shall direct or appoint, free and discharged of and from all right and equity of redemption whatsoever. And it is hereby agreed and declared, that the said Charles Green, his heirs or assigns, shall stand and be possessed of the money which shall arise from such sale or sales, and the rents and profits, (if any), which shall have come to his or their hands by virtue of these presents, upon trust, in the first place to pay or retain and satisfy unto himself and themselves, the said Charles Green, his heirs or assigns, the costs and expenses attending the said sale or sales, or the receipt or recovery of such rents and profits, or which shall have been incurred by him or them in obtaining the possession of, or enforcing any contract or contracts for the sale of, the said hereditaments, and all other expenses arising or incurred in the execution of the powers and trusts herein-before contained, and in the next place to retain or pay and satisfy unto him the said Charles Green, his executors, administrators, or assigns, the said principal sum of £900, with interest for the same after the rate aforesaid, or so much of the same sum and interest respectively as shall then remain unpaid, clear of all deductions as aforesaid; and in case, after full payment and satisfaction thereof, any sum or sums of money shall remain in the hands of the said Charles Green, his heirs, or assigns, then upon trust to pay such residue or surplus unto the said John Smith, his heirs or assigns, or as he or they shall direct. Provided also, and it is hereby further declared and agreed, that every receipt which shall be given by

Power of sale after default.

on giving three calendar months' previous notice.

Application of moneys arising from the sale, &c.

To pay expenses, and principal and interest moneys.

To pay surplus to mortgagor.

Mortgagee's receipt, to dis-

No. VI.

charge purchasers.

the said Charles Green, his heirs or assigns, or his or their agent or agents, to the purchaser or respective purchasers of the said hereditaments, and premises, so to be sold as aforesaid, for his, her, or their purchase-money, or respective purchase-moneys, or any part of the same respectively, shall effectually discharge the person or persons paying the same from all responsibility in respect of the application thereof; and that the purchaser or purchasers of the said hereditaments and premises, shall not be obliged to inquire whether such default has been made, or whether such notice has been given as is hereinbefore required, or into any other matter or thing connected with the propriety or regularity of any sale or sales made by the said Charles Green, his heirs or assigns, and shall not be affected by express notice from the said John Smith, his heirs or assigns, or any other person or persons, that no such default has been made or notice given as aforesaid, or that such sale or sales is or are unnecessary and improper. Provided also, and it is hereby further declared and agreed, that the power of sale, and other the powers and authorities herein contained, are not intended, and shall not be deemed to be personal unalienable trusts, but shall and may, from time to time, vest in and be exercisable by the person or persons in whom the legal ownership of the said hereditaments and premises shall or may for the time being be vested by descent, devise, conveyance, or otherwise, nor shall the power of sale hereinbefore contained be construed to extend to destroy, prejudice, or affect the rights or remedies of the said Charles Green, his heirs or assigns, as a mortgagee or mortgagees of the said hereditaments and premises, under or by virtue of these presents, but that it shall be lawful for him or them to proceed to a foreclosure of the equity of redemption of the said premises, or otherwise to enforce his or their said rights and remedies as a mortgagee or mortgagees, in the same manner, and as effectually, to all intents and purposes, as if no such power of sale had been herein contained. And the said John Smith, for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said Charles Green, his heirs, executors, administrators, and assigns, in manner following, (that is to say), that the said John Smith, his heirs, executors, administrators, or assigns, will duly pay or cause to be paid unto the said Charles Green, his executors, administrators, or assigns, the said sum of £900 with interest for the same after the rate aforesaid, at the time and in the manner hereinbefore appointed for payment of the same, according to the true intent and meaning of these presents; and also, that the said John Smith now hath in himself good right and absolute authority by these presents to appoint and release or otherwise assure the said messuage, hereditaments and premises to the use of the said Charles Green, his heirs and assigns, for ever, in manner aforesaid, and according to the true intent and meaning of these presents; And also, that (subject to the declaration and agreement hereinafter contained) it shall be lawful for the said Charles Green, his heirs and assigns, from time to time, and at all times for ever hereafter, peaceably and quietly to enter into or upon, and hold and enjoy the said messuage, hereditaments, and premises, and every part of the same, and to receive and take the rents and profits of the same, without any interruption or denial whatsoever, from or by the said John Smith, or any other person or persons whomsoever; And that free and clear from all charges and incumbrances whatsoever; And also, that the said John Smith and his heirs, and every person whosoever having any estate, right, title, or interest, at law or in equity, in, to, upon or out of the said messuage, hereditaments, and premises, or any part thereof, will, at any time or times hereafter, upon every

Purchasers not obliged to inquire into the propriety of sale.

Powers of sale, &c., to run with the land.

Mortgagee's right of foreclosure, &c., not to be affected.

Mortgagor covenants,

to pay principal and interest moneys;

that he has a right to assure;

for quiet enjoyment;

free from all incumbrances;

and for further assurance.

No. VI.

reasonable request of the said Charles Green, his heirs, executors, administrators or assigns, and at the costs and charges of the said John Smith, his heirs, or assigns, until the said hereditaments and premises shall have been sold and conveyed under the power of sale hereinbefore contained, or the right or equity of redemption therein shall be released, barred, or extinguished, and thenceforth at the costs and charges of the said Charles Green, his heirs or assigns, make, do, execute, and perfect every such lawful act, deed, appointment, conveyance or assurance in the law whatsoever, for more effectually or satisfactorily limiting, appointing, releasing, confirming, or otherwise assuring the said messuage, hereditaments, and premises, and every part of the same, to the use of the said Charles Green, his heirs and assigns, for ever, or as he or they shall direct, according to the true intent and meaning of these presents, as by the said Charles Green, his heirs or assigns, or his or their counsel in the law, shall be reasonably advised and required. Provided also, and it is hereby further declared and agreed, by and between the said parties to these presents, and particularly the said Charles Green, for himself, his heirs, executors, and administrators, doth hereby covenant with the said John Smith, his heirs and assigns, that, until default shall be made in payment of the said sum of £900, or the interest thereof, or any part of the same respectively, contrary to the true intent and meaning of the proviso or agreement for redemption hereinbefore contained, it shall be lawful for the said John Smith, his heirs or assigns, to hold and enjoy, and to receive and take the rents and profits of, the said messuage, hereditaments, and premises, without any interruption or denial whatsoever of or by the said Charles Green, his heirs, executors, administrators, or assigns, or of or by any person or persons rightfully claiming or to claim by, from, under, or in trust for him or them, anything hereinbefore contained to the contrary notwithstanding. In witness whereof the said parties hereto have set their hands and seals this 1st day of March, 1844.

Proviso for quiet enjoyment by mortgagor until default.

Signed, sealed, and delivered by the above named John Smith, and Charles Green, in the presence of

Robert Brown.
William Scott.

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